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Supreme Court of the United States

OCTOBER TERM, 1925

No. 188

274
17

JAMES M. HODGSON, APPELLANT,

vs.

**FEDERAL OIL AND DEVELOPMENT COMPANY AND
THE MOUNTAIN AND GULF OIL COMPANY,
APPELLEES.**

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF OF APPELLANT.

**J. M. HODGSON, of Denver, Colo.,
F. E. PENDELL, of Denver, Colo.,
Attorneys for Appellant.**

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Supreme Court of the United States

OCTOBER TERM, 1925

No. 596

JAMES M. HODGSON, APPELLANT,

vs.

FEDERAL OIL AND DEVELOPMENT COMPANY AND
THE MOUNTAIN AND GULF OIL COMPANY,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLANT.

JURISDICTION

The opinion delivered by the United States Circuit Court of Appeals in this case is found reported in 5 F. (2d) 442.

The opinion delivered by the United States District Court for the District of Wyoming is found reported in 285 Fed. 546.

1. This is an appeal from a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, and the case is a suit in equity brought by the plaintiff and appellant against the defendants and appellees the Federal Oil & Development Company and The Mountain & Gulf

Oil Company, in the United States District Court for the District of Wyoming, to recover an undivided one-eighth interest in an oil and gas lease granted by the United States to the Federal Oil & Development Company, covering the Southeast Quarter of Section 13, Township 40 North, Range 79 West, in Natrona County, Wyoming, known as the O'Glase oil placer mining claim, to have the defendants judicially declared to be holding said undivided interest as trustees for plaintiff, and for an accounting. Said lease was assigned and transferred by the defendant the Federal Oil & Development Company to the defendant The Mountain & Gulf Oil Company on April 28, 1921, the said assignment reserving to the defendant the Federal Oil & Development Company forty per cent of the net proceeds derived from the oil and gas produced and extracted from said leased premises under said lease. (R. 18.)

This action was commenced by the plaintiff on May 26, 1922, by the filing of a bill of complaint in said District Court and the issuing of a subpoena in chancery on that date. The jurisdiction of the District Court for the District of Wyoming over this suit was invoked and depended upon the following grounds, to-wit: (1) Upon the ground that the construction, application and effect of Sections 2329, 2330, 2331, and 2332 of the Revised Statutes of the United States, and the Act of Congress of February 25, 1920, c. 85, 41 Stat. 437, being an Act to promote the mining of coal, phosphate, oil, oil shales, gas and sodium on the public domain, are involved, and that the amount in controversy exceeds in value the sum of three thousand dollars, exclusive of interest and costs; and (2) that the plaintiff's right to recover in this action arises under and rests solely upon the construction and effect of the above mentioned statutes of the United States, and more particularly upon the construction and effect of Section 18 of the Act of Congress of February 25, 1920, c. 85, 41 Stat. at L. 441-443. (R. 2-12-19-20-22.) To the plaintiff's bill of complaint the defendants each filed separate motions to dismiss, and amend-

ments thereto, (R. 24-25-26-27.) alleging the following grounds for dismissal:

(1) That the bill of complaint fails to state facts sufficient to constitute a cause of action; (2) that the plaintiff has been guilty of laches; (3) that relief is barred by the limitations contained within the Act of Congress of February 25, 1920; (4) the statute of limitations of the State of Wyoming; (5) a final determination and adjudication of all matters in controversy between the plaintiff and the defendants by the Secretary of the Interior of the United States against all rights claimed by plaintiff; and (6) that the United States is an indispensable party to the action.

These motions to dismiss were duly argued in the District Court on the 6th and 8th of November, 1922, and thereafter on the 16th of December, 1922, the District Court made and entered a final order or decree, dismissing this action, in the following words, to-wit:

"This cause having heretofore come on to be heard at this term of the court upon motion to dismiss the Bill of Complaint herein, and having been argued by counsel for the parties hereto and having been taken under advisement by the Court:

"It is Now Ordered by the Court that said motion to dismiss be, and the same is hereby, sustained, and said Bill of Complaint is hereby dismissed out of this court at the cost of the complainant to be taxed, to which order and ruling of the Court the complainant by his solicitor excepts." (R. 29.)

Thereafter the plaintiff duly prosecuted an appeal from said final order dismissing the action, to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at Denver, Colorado, and upon said appeal from the order of the United States District Court for the District of Wyoming to the Circuit Court of Appeals, the plaintiff and appellant made the following Assignment of Errors:

(1) That the court erred in sustaining the defendant the Federal Oil and Development Company's motion and the

amendment thereto to dismiss the bill of complaint and dismissing the bill.

(2) That the court erred in sustaining the defendant The Mountain and Gulf Oil Company's motion and the amendment thereto to dismiss the bill of complaint and dismissing the bill.

(3) That the court erred in rendering and entering its final order of December 16, 1922, dismissing the bill of complaint in this action, the said order being contrary to law.

(4) That the court erred in rendering judgment upon the pleadings dismissing the bill of complaint in this action.

(5) That the final order dismissing the bill of complaint herein is erroneous in holding that the bill of complaint does not state facts sufficient to constitute a cause of action.

(6) That the final order dismissing the bill of complaint is erroneous in holding that the cause of action set forth in the bill of complaint is barred by the statute of limitations of the State of Wyoming.

(7) That the final order dismissing the bill of complaint is erroneous in holding that the plaintiff and his grantors had been guilty of laches in not sooner asserting their right and title to the property in controversy.

(8) That the final order dismissing the bill of complaint is erroneous in holding that the cause of action set forth in the bill of complaint is barred by the six months statute of limitations contained in the Act of Congress of February 25, 1920, known as the Oil Leasing Act (41 Stat. 437).

(9) That the final order dismissing the bill of complaint is erroneous in holding that there has been a final and binding adjudication of the matters and things set forth in the bill of complaint herein by the Secretary of the Interior of the United States, against all rights claimed by the plaintiff.

(10) That the final order dismissing the bill of complaint in this action is erroneous in holding that the United States of America is an indispensable party defendant to the

equitable and complete determination of the cause of action set forth in the bill of complaint.

(11) That the court erred in not overruling and denying the motions to dismiss, and each of them, and the amendments thereto, filed by the defendants in this action.

(Record pp. 31-32.)

2. Thereafter, this cause was duly argued in the United States Circuit Court of Appeals at Denver, Colorado, and submitted to the said Circuit Court of Appeals on the transcript of the record from said District Court and the briefs of counsel filed herein, (R. 47) and *on March 28, 1925*, the Circuit Court of Appeals for the Eighth Circuit rendered and entered a decree affirming the order of dismissal of the District Court, which decree, omitting the caption, is in words and figures as follows:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming and was argued by counsel.

"On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from, in this cause, be, and the same is hereby affirmed with costs; and that the Federal Oil and Development Company and The Mountain and Gulf Oil Company have and recover against James M. Hodgson the sum of Twenty Dollars for their costs herein and have execution therefor.

"March 28, 1925." (R. 64.)

No Petition for a Rehearing was ever made or filed in the said cause.

In the majority opinion of the Circuit Court of Appeals, filed in support of its decree affirming the order of the District Court, and reported in 5 F. (2d) 442, that Court held that the plaintiff's cause of action was barred by the six months limitation contained within Section 18 of the Act of Congress approved February 25, 1920, 41 Stat. at L. 437, and was properly dismissed by the District Court under the third ground of the motions to dismiss, and the

order of the lower Court was affirmed on that ground. The majority of the Court specifically refused to consider the other questions raised and argued in the case. (R. 55-52.) The very opposite construction of this statute as applied to the facts found in this record is contended for by the plaintiff and appellant, and such construction as appellant contends for entitles him to recover in this action. The judgment of the Circuit Court of Appeals was made by two District Judges, and a dissenting opinion was filed by Circuit Judge Stone, reported in 5 F. (2d) 446-451, which dissenting opinion of the Circuit Judge upheld all the contentions of the plaintiff and appellant.

3. That this is a case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of the Judicial Code, Title, The Judiciary, prior to the Amendment of February 13, 1925, where the matter in controversy shall exceed one thousand dollars, besides costs. The statutory provisions under which the jurisdiction of this Court is invoked are Section 24, Subdivision 1, and Section 241, of the Judicial Code, as it existed prior to the Amendment of February 13, 1925, which went into effect on May 13, 1925, and Section 14 of the said Act of Congress of February 13, 1925, 43 Stat. at L. 936.

4. The cases cited below sustain the jurisdiction of this Court.

Butte & S. Copper Co. v. Clark-Mont. R. Co. 249 U. S. 12
Elder v. Horseshoe Min. Co. 194 U. S. 248
Yosemite G. M. & M. Co. v. Emerson, 208 U. S. 25
Wilson Cyp. Co. v. Del Pozo y Marcos, 236 U.S. 635, 643
Hopkins v. Walker, 244 U. S. 486
Lancaster v. Kathleen Oil Co. 241 U. S. 551
Macon Gro. Co. v. Atl. Cst. Line R. Co. 215 U.S. 501, 506
Osborn v. Bank of U. S., 9 Wheat. 822, 824

5. The petition for appeal to the Supreme Court of the United States was filed in the United States Circuit Court of Appeals for the Eighth Circuit and presented to the

Circuit Judge thereof for allowance on June 13, 1925. (R. 65.)

6. The Assignment of Errors on appeal to the Supreme Court of the United States was filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 13, 1925. (R. 65-66-67-68.)

7. The order allowing appeal to the Supreme Court of the United States and fixing the amount of the bond for costs on appeal was made by the Hon. Kimbrough Stone, Judge of the United States Circuit Court of Appeals on June 13, 1926, and the Bond on Appeal was approved and filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 22, 1925. (R. 68-69.)

8. The Praecipe for Transcript on Appeal to the Supreme Court of the United States was filed in the United States Circuit Court of Appeals on June 13, 1925, and the Notice of filing Praecipe for Transcript on Appeal, together with a copy of the Praecipe for Transcript on Appeal, was duly served on and service thereof accepted by the solicitors for the appellees on June 18, 1925, and thereafter filed in the United States Circuit Court of Appeals on June 22, 1925. (R. 69-70.)

9. The Citation on Appeal to the Supreme Court of the United States was duly issued by the Circuit Judge on June 13, 1925, and personally served on the solicitors for appellees on June 18, 1925, and filed in the United States Circuit Court of Appeals on June 22, 1925. (R. 71-72.)

10. The Transcript of Record in this case was filed in the office of the Clerk of the Supreme Court of the United States on July 10, 1925.

11. The statement of points to be relied upon and designation by appellant of parts of the record to be printed, with proof of service, was filed in the Supreme Court of the United States on July 18, 1925. (R. 73-74.)

STATEMENT OF THE CASE.

As the defendants prevailed in both the District Court and the Circuit Court of Appeals, the appellant will hereafter be referred to in this brief as the plaintiff and the appellees as the defendants. The following is a concise statement of the case, alleged in the bill of complaint, containing all that is material to the consideration of the questions presented. The defendant the Federal Oil & Development Company is a corporation organized and existing under the laws of the State of Delaware, having its principal office in the city of Wilmington in said State of Delaware, and doing business in Natrona County, Wyoming; the defendant The Mountain & Gulf Oil Company is a corporation organized and existing under the laws of the State of Wyoming, having its office in the city of Cheyenne, Laramie County, Wyoming; (R. 1.) that the plaintiff is a citizen and resident of the State of Wyoming, and since 1889 has been and still is a citizen of the United States, and during all of said time was qualified to locate and hold oil placer mining claims, and is now qualified to hold oil leases, under the laws of the United States. (R. 1, 2.) That the jurisdiction of the United States District Court for the District of Wyoming over this suit was invoked and depended upon the following grounds, to-wit: (1) Upon the ground that the construction, application and effect of Sections 2329, 2330, 2331, and 2332 of the Revised Statutes of the United States, and the Act of Congress of February 25, 1920, c. 85, 41 Stat. 437, being an Act to promote the mining of coal, phosphate, oil, oil shales, gas, and sodium on the public domain, are involved, and the amount in controversy exceeds in value the sum of three thousand dollars, exclusive of interest and costs, all of which will appear from the facts hereinafter set forth. (2) That the plaintiff's right to recover in this action arises under and rests upon the construction and effect of the Act of Congress of February 25, 1920, c. 85, 41 Stat. 437, commonly

known as the Minerals Leasing or Oil Leasing Act, as applied to the facts set forth in the bill of complaint herein. (R. 2.) That on January 11, 1887, the Southeast Quarter of Section 13, Township 40 North, Range 79 West, situate in what was then the County of Carbon, Territory of Wyoming, and is now the County of Natrona and State of Wyoming, was a part of the vacant and unappropriated public domain of the United States, to which lands the United States surveys had been extended, and was on said date subject to exploration, location, entry and purchase under the placer mining laws of the United States; that on said date M. Iba, H. T. Snively, George McManus, sometimes known as, and under the name of George McManes, (R. 2-8-11-12.) Perry Doan, Martin Ashcraft, Sam Bedsaul, G. B. Hall, and Wm. F. Ford, being then and there each and all of them, citizens of the United States qualified to locate and hold oil placer mining claims under the mining laws of the United States, entered upon the above described quarter section of land and did make a valid discovery of valuable deposits of petroleum oil, in certain and substantial quantities, therein and thereon, (R. 2.) and thereupon associated themselves together for the purpose of locating, holding and working in good faith the said quarter section of land as an oil placer mining claim, and did, as an association of eight persons, jointly locate the said southeast Quarter of Section 13, T. 40 N. of R. 79 W., as an association oil placer mining claim by securely fixing on said quarter section of land a notice in plain written and printed letters, containing the name of the claim, to-wit, the O'Glase oil placer mining claim, the names of the locators, M. Iba, H. T. Snively, George McManus, sometimes known as, and under the name of, George McManes, (R. pp. 2-3-8-11-12.) Perry Doan, Martin Ashcraft, Sam Bedsaul, G. B. Hall, and Wm. F. Ford, the date of the discovery of said O'Glase oil placer mining claim, to-wit, January 11, 1887, the number of acres claimed, to-wit, 160 acres, and thereafter the said locators did distinctly mark upon the ground

the surface boundaries of said placer mining claim by four substantial posts, one at each corner of said claim. That within ninety days after the date of discovery of said placer mining claim, and on February 15, 1887, the said discoverers and locators recorded the said O'Glase oil placer mining claim in the office of the Register of Deeds of Carbon County, Wyoming Territory, within which said oil placer mining claim was situated, by filing in the said office a proper location certificate, which location certificate contained the name of the claim, and designated it as an oil placer claim, to-wit, the O'Glase oil placer mining claim; the names of the locators, M. Iba, H. T. Snively, George McManus, sometimes known as, and under the name of, George McManes, (R. pp. 3-8-11-12.) Perry Doan, Martin Ashcraft, Sam Bedsaul, and Wm. F. Ford, the date of the location and the number of acres claimed as given above, and such a description of said oil placer mining claim by designation of such natural or fixed monuments as should identify the claim beyond question by conforming the exterior boundary lines of said oil placer mining claim to the legal subdivisions of the public lands as shown by the United States surveys, and by describing the said O'Glase oil placer mining claim in said location certificate as the Southeast Quarter of Section 13, Township 40 North, Range 79 West, situated in Carbon County, Wyoming Territory, now the County of Natrona in the State of Wyoming. (R. 3.) That the said O'Glase oil placer mining claim contains valuable mineral deposits, to-wit, petroleum and other mineral oils, and the lands embraced within the exterior boundaries of said oil placer mining claim are chiefly valuable for the petroleum contained therein. (R. 4.) The said George McManus and his colocators and co-owners complied with all the requirements of the laws of the United States, of the Territory and State of Wyoming, and with the local customs or rules of miners in the Rattlesnake Mining District so far as the same are applicable and not inconsistent with the laws of the United States, in the

matter of the doing of the annual assessment work upon the said O'Glase oil placer mining claim, and the said George McManus and his colocators and co-owners performed the annual labor during each year upon the said O'Glase oil placer mining claim, by performing, or causing to be performed, thereon not less than one hundred dollars' worth of labor or improvements made, during each year since the year 1887 down to and including the year 1920. (R. 4.) That the said George McManus, sometimes known as George McManes, and his colocators and co-owners, continued to be in the actual, open, exclusive and uninterrupted possession of the said O'Glase oil placer mining claim without any adverse claim being made thereto for more than ten successive years from the date of discovery and location thereof on January 11, 1887, working the same continuously, and that the said actual, open, exclusive and uninterrupted possession, and working of said oil placer mining claim, continued down to and including the date of the Order of Withdrawal of September 27, 1909. (R. 4.) That the said quarter section of land located, known, and kept up as the O'Glase oil placer mining claim is situated and lies within the limits and exterior boundaries of the area embraced and included within the Executive Order of Withdrawal issued by the President of the United States of date September 27, 1909; (R. 5.) and that the said George McManus and his colocators and co-owners have remained in the open, notorious, exclusive, continuous and undisturbed possession, use, enjoyment, and development of the said Southeast Quarter of Section 13, T. 40 N., R. 79 W., located and known as the O'Glase oil placer mining claim from the time of its said location by the said McManus and his said colocators on January 11, 1887, down to the present time. (R. 5.) That by said Executive Order of Withdrawal of September 27, 1909, the area embraced and included therein was withdrawn from further location, entry, and purchase under the mining laws of the United States, and said Executive Order of Withdrawal has never

been recalled or revoked. (R. 5.) That at the date of the said Executive Order of Withdrawal of September 27, 1909, the said Southeast Quarter of Section 13, T. 40 N., R. 79 W., located and known as the O'Glase oil placer mining claim was a valid and subsisting mining claim under the mining laws of the United States by virtue of the actual discovery therein of valuable deposits of petroleum oil in certain and substantial quantities, the doing of the various acts of location as required by law, and the performance thereon of not less than one hundred dollars' worth of labor, or improvements made, on said oil placer mining claim, and the continuous working thereof, during each year since January 11, 1887, down to and including the date of the Executive Order of Withdrawal of September 27, 1909, by the said George McManus and his colocators and co-owners of said placer mining claim. (R. 5.)

That the rights, title, interests and estate of the said original locator George McManus, sometimes known as George McManes, his heirs, and of this plaintiff as their successor in interest, and the rights, title, interests and estate of his said colocators and co-owners, under the mining laws of the United States, in and to the said O'Glase oil placer mining claim, have never been forfeited and have never been abandoned. (R. 6.) George McManus died intestate on or about the 16th day of September, 1901, leaving him surviving as his sole heirs at law a widow, a daughter, and a grandson; the said widow and daughter have never been citizens or residents of the State of Wyoming, and have never been within the State of Wyoming during all the time from January 11, 1887, and until the commencement of this action, and during all of said time, but at different periods thereof, have been citizens and residents of the States of Nebraska and Iowa; and that the said grandson was never a citizen or resident of Wyoming until ——— years immediately preceding the commencement of this action. (R. 6.) That none of the said heirs at law of said George McManus knew or had any knowl-

edge, or information leading to knowledge, of the right, title, interest and estate of the said George McManus in and to the said O'Glase oil placer mining claim, under the mining laws of the United States, or otherwise, until on or after the 11th day of February, 1922; and that none of said heirs of George McManus had or acquired until February 11, 1922, any actual knowledge of the right and privilege granted them by the Act of Congress of February 25, 1920, known as the Oil Leasing Bill, to make application, within six months after the approval of said Act, for and to be granted an oil and gas lease to the said quarter section of land under the provisions of said Act of Congress of February 25, 1920, granting and confirming to all owners of the mining title under the pre-existing placer mining law a preferential right to an oil lease for any oil lands theretofore duly located as oil placer mining claims under the laws of the United States. (R. 6, 7.)

That on and since February 11, 1922, and prior to the commencement of this action, the said heirs of George McManus for a good and valuable consideration conveyed to this plaintiff by conveyance duly executed and recorded their right, title, interest and estate in and to the said Southeast Quarter of Section 13, Township 40 North, Range 79 West, located, known, worked, and held by the said George McManus and his colocators thereof as the O'Glase oil placer mining claim, and that this plaintiff is still the owner and holder and entitled to the possession of said interest and estate in said premises, and any oil lease covering the said premises that has been issued by the Government of the United States, under the provisions of Section 18 of said Act of Congress of February 25, 1920, c. 85, 41 Stat. 443. (R. 7.) That George McManus during his lifetime never sold, granted or conveyed, and never executed any deed, instrument or conveyance, selling, transferring, conveying, or encumbering, his right, title, interest and estate in and to the said O'Glase oil placer mining claim, or any part thereof, to any person or corporation

whatsoever, nor did any other person thereunto lawfully authorized ever sell and convey the interest of the said George McManus to any person or corporation whatsoever; and that the said heirs of George McManus after his death never made any deed or conveyance selling, conveying, or transferring their inherited interests and estates in the said quarter section of land to any person or corporation whatsoever, save and except to this plaintiff. (R. 7-8.)

That on August 21, 1920, the defendant the Federal Oil & Development Company claiming to be the successor in interest of all the locators of the O'Glase oil placer mining claim, filed in the United States Land Office at Douglas, Wyoming, its application for an oil and gas lease on the said O'Glase oil placer mining claim under the provisions of Section 18 of the Act of Congress of February 25, 1920, c. 85, 41 Stat. 443, and in its said application the said defendant stated that,

"The claim of this claimant and its predecessors in interest in said land was initiated under the placer mining law prior to July 3, 1910, to-wit, on or prior to January 11, 1887, by location and entry under the placer mining laws by M. Iba, H. T. Snively, George McManes, Perry Doan, Martin Ashcraft, Sam Bedsaul, G. B. Hall, and Wm. F. Ford." (R. 8.)

On March 11, 1884, George McManus, Perry Doan, Sam Bedsaul, Scott Morford, James McFarland, William Hudson, and William Myers gave to Shepherd Fales and Cy Iba a power of attorney to jointly locate for said principals oil placer mining claims in Carbon County, in the then Territory of Wyoming, and delegated the power to Shepherd Fales and Cy Iba to jointly sell and convey, as joint agents of the said principals, such lode claims and placer mining claims as might be located by the said Shepherd Fales and Cy Iba as attorneys in fact for the said principals above named, all of which appears on the face of said instrument; that by the terms of the said power of attorney all the right, power and authority delegated thereby was delegated

to the said Shepherd Fales and Cy Iba as joint agents and not severally, and required the joint exercise and execution thereof by the said constituents named in the said powers as the agents of the said George McManus and his co-principals named therein; that the said O'Glase oil placer mining claim was not located by the said Shepherd Fales and Cy Iba acting as the joint agents and attorneys in fact for the said George McManus and any of his co-principals named in said power. Said power of attorney was never exercised jointly by the said Shepherd Fales and Cy Iba, or as joint agents of their said principals, and that no deed, or other instrument, conveying said premises has ever been executed by the said Shepherd Fales and Cy Iba acting in the joint exercise of said power, and that Shepherd Fales never joined with the said Cy Iba in the execution of any conveyance of the said premises, or any part thereof, and never sold or conveyed any interest or estate of George McManus in the premises hereinbefore described by deed or any other instrument executed or purporting to be executed as attorney in fact for the said George McManus, or executed or purporting to be executed by the said Shepherd Fales in his own behalf.

That George McManus never executed or delivered any other power of attorney, or instrument in writing, authorizing and empowering Cy Iba or any other person, to locate or sell and convey oil placer mining claims in the Territory and State of Wyoming, or in any other place, other than the said power of attorney executed on March 11, 1884, running to and specifically naming therein Shepherd Fales and Cy Iba to act jointly as the attorneys in fact and joint agents only for the said George McManus and his co-principals for the purposes therein named. (R. 13, 14.) That the said Cy Iba never possessed any right, power, or authority, or had conferred upon him by said George McManus any right, power or authority, to make a separate and several conveyance of the right, title, interest and estate of the said McManus in and to the said premises. (R. 14.)

That the said power of attorney is not the same power, either in fact, substance or in its legal effect, as the power considered and construed by the Commissioner of the General Land Office in the decision "A" of February 28, 1921, in the case of the application for lease, Douglas 028027 of F. G. Bonfils, (R. 12.) the said decision being referred to and relied upon by the Commissioner of the General Land Office in his decision of March 25, 1921, in the said application for lease of the defendant the Federal Oil & Development Company as ruling and being decisive of the law applicable to and governing the said power of attorney given by the said George McManus and his co-principals hereinbefore named to Shepherd Fales and Cy Iba on March 11, 1884. (R. 14.)

That the said O'Glase oil placer mining claim described as the Southeast Quarter of Section 13, T. 40 N., R. 79 W., and comprising 160 acres, was located on January 11, 1887, by M. Iba, H. T. Snively, George McManus, Perry Doan, Martin Ashcraft, Sam Bedsaul, G. B. Hall, and Wm. F. Ford, acting individually in their joint behalf, and was not located by the said locators by or through Shepherd Fales and Cy Iba acting jointly as their attorneys in fact, or by Cy Iba as attorney in fact for said locators, or any of them, or by Cy Iba; and that the name of Cy Iba does not appear upon or in said location certificate of said O'Glase oil placer mining claim as a locator thereof, or otherwise. (R. 14-15.)

On February 18, 1890, Cy Iba, pretending to act as attorney in fact for George McManus and his colocators of the O'Glase placer mining claim, executed a quit-claim deed to one Victoria A. D. Johnson, purporting on its face to convey to said Johnson an undivided one-half interest in and to said premises known as the O'Glase oil placer mining claim comprising the Southeast Quarter of Section 13, T. 40 N., R. 79 W.; (R. 11-15.) that said deed was not executed and delivered by said Shepherd Fales jointly with said Cy Iba, nor was said Shepherd Fales named as a grantor therein, nor was he a party thereto, and in no

way joined in said deed. (R. 11-15.) This deed made Victoria A. D. Johnson a tenant in common with the locators of the O'Glase placer mining claim. (R. 1 to 21.)

On March 16, 1900, Ashcraft and Bedsaul conveyed what interest they had in the claim to Cy Iba, (R. 11.) it being their remaining interest, two-sixteenths, in the premises. On April 12, 1905, Cy Iba, who was not a locator of the O'Glase claim, (R. 14-15.) by a quit-claim deed, which purported on its face to convey an undivided one-half interest in the premises, conveyed the only interest he had, to Joseph H. Lobell. (R. 15-16.) This deed conveyed the Bedsaul and Ashcraft interests acquired by Cy Iba on March 16, 1900, to Lobell, (R. 11.) and made him a tenant in common with the locators. (R. 1 to 21.)

On February 16, 1907, Victoria A. D. Johnson conveyed an undivided one-half interest in the claim to Frederick J. Lobell, who two days later conveyed the same undivided interest to Joseph H. Lobell. The title to the undivided interests thus acquired by Joseph H. Lobell passed on August 26, 1915, to the defendant Federal Oil & Development Company. (R. 11-16.)

On May 15, 1918, the Federal Oil & Development Co. applied for a mineral patent to the premises; this application was adverse by the United States, but the application was withdrawn on March 25, 1920, one month after the passage of the Oil Leasing Act. (R. 10-11.) In considering that application for a mineral patent the General Land Office found as a matter of law that George McManus owned at that time an undivided one-sixteenth interest in the O'Glase placer mining claim, but afterwards reversed that decision on the application for the oil lease later made, and held that all the title of McManus had passed to the Federal Oil & Development Co. by purchase. (R. 12.)

That no other deeds or instruments of conveyance purporting to convey the title and estate of said George McManus to the said premises have ever been executed or recorded other than those hereinbefore set forth. That the pretended right and title of the defendant the Federal Oil

& Development Company to the said title, interest and estate of said George McManus under the pre-existing mining law in and to the said premises, upon which title the said oil lease was applied for and granted, is founded and rests solely upon the deeds hereinbefore described from Cy Iba to Victoria A. D. Johnson and Joseph H. Lobell. (R. 16.)

That by the provisions of Section 18 of the said Act of Congress of February 25, 1920, the applicant for an oil and gas lease on any lands theretofore withdrawn by the Executive Order of Withdrawal of September 27, 1909, must found his application for such lease upon and be possessed of the title of the locators of such oil and gas bearing lands under the pre-existing placer mining law, and must in fact and in law be possessed of all the right, title, interest and claim of the locators in and to such oil placer mining claim, in order to entitle such applicant to an oil and gas lease on such oil lands that had heretofore been located, worked and held under the pre-existing placer mining law of the United States. (R. 12-20.)

That in the decision of the Commissioner of the General Land Office of date March 25, 1921, approving the application and recommending the granting of an oil lease to the defendant the Federal Oil & Development Company, which was subsequently approved by the Secretary of the Interior on April 1, 1921, the Commissioner of the General Land Office and the Secretary of the Interior found as a matter and conclusion of law that the power of attorney hereinbefore referred to given by McManus and his co-principals named therein on March 11, 1884, to Shepherd Fales and Cy Iba jointly, was an irrevocable deed of trust authorizing and empowering the said Cy Iba to sell and convey all the right, title, interest and estate of George McManus in and to the O'Glase oil placer mining claim; (R. 16-17.) and said officials further found as a matter of law that the deeds executed and delivered by Cy Iba to Victoria A. D. Johnson on February 18, 1890, and to Joseph H. Lobell on April

12, 1905, conveyed to the said grantees the mining title and all the right, title and interest of George McManus in and to the said O'Glase oil placer mining claim to said grantees; and further found as a matter of law that all the right, title, interest and estate of the said George McManus in and to said premises had passed to and vested in the Federal Oil & Development Company on or about August 26, 1915, by virtue of said deeds; (R. 17.) and further found as a matter of law that the right, title, interest and estate held under the pre-existing placer mining law by George McManus and his colocators of said oil placer mining claim, had passed to and was vested in the defendant the Federal Oil & Development Company on and prior to the date of its application for said lease; and further found as a matter of law that the defendant the Federal Oil and Development Company was the holder of the fee title to the O'Glase oil placer mining claim, and that the question of the mining title to said premises was not in issue on that application, and that the title possessed and held by said applicant was sufficient in law to entitle it to a lease under the provisions of said Act of Congress of February 25, 1920, applicable thereto; (R. 17.) and further found as a matter and conclusion of law that the quit-claim deed executed and delivered to the United States by the said applicant on August 20, 1920, relinquished and conveyed to the United States all the right, title, interest, claim, and estate of the claimants or locators, and each of them, including said George McManus, in and to said premises as an oil placer mining claim, and relinquished and conveyed all the mining title to said premises held by said locators under the pre-existing placer mining law. (R. 17.) That in making said decision, and findings or conclusions of law upon which the same is based, and granting the said lease to the defendant the Federal Oil & Development Company, the Commissioner of the General Land Office and Secretary of the Interior mistook, misconstrued and misapplied the law applicable to said power of attorney and deeds, and

the title upon which said application for lease was founded, particularly the construction and application of the provisions of said Act of Congress of February 25, 1920, c. 85, (41 Stat. 437) and Sections 2330 and 2331 of the Revised Statutes of the United States, and by reason of such mistake in, and misconstruction and misapplication of, the law applicable thereto, granted said oil lease to the Federal Oil & Development Company. (R. 18.)

That on August 21, 1920, and long prior thereto, and at and prior to the time of the assignment of said oil lease to the defendant The Mountain & Gulf Oil Company, the said defendants, and each of them, had full knowledge and notice, actual and constructive, of all the claim, right, title, estate and interest of the said George McManus, and his heirs, in and to an undivided one-eighth interest in said premises and the oil contents thereof. (R. 18.)

It is further alleged in the bill of complaint that by reason of all and singular the matters and facts therein alleged this plaintiff is now a cotenant of the said defendants, and each of them, in said leased premises and said oil and gas lease granted to the said defendant the Federal Oil & Development Company by the United States of America as of August 21, 1920, and rightfully entitled to an undivided one-eighth interest in said oil lease, and the oil extracted from said premises, subject to the payment and deduction of the cost and expense of development, operation and production, and the payment of royalty to the United States, and that said defendants now hold said undivided one-eighth interest in said oil lease as trustees for this plaintiff. (R. 18-19.) Said defendants are now in the actual possession of said premises and engaged in extracting oil therefrom in large quantities, selling the same, and appropriating to their sole use and benefit the entire net proceeds of said oil, and excluding this plaintiff from any interest or share therein. (R. 19.) That on April 1, 1921, an oil and gas lease covering and conveying said premises was executed and delivered to the defendant the

Federal Oil & Development Company as of the 21st day of August, 1920, for a period of twenty years, with the preferential right to said lessee to renew said lease for successive periods of ten years, unless otherwise provided by law at the time of the expiration of such periods. (R. 9-10.) In said bill of complaint it is further alleged, upon information and belief, that since the granting of said oil lease the average daily production of oil extracted from said premises by the defendants is in excess of 1,200 barrels per day and that the value of said leased premises is the sum of \$2,400,000. (R. 19.) That by Section 18 of said Act of Congress of February 25, 1920, it is provided that all leases granted under said Act shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear; that this plaintiff, as the successor in interest of the said George McManus and his heirs at law to the mining title held in fee by his said grantors at the time of the granting of said oil lease, comes within the purview and meaning of said inuring clause of Section 18 of said Act of Congress, and has the equitable title to an undivided one-eighth interest in said leased premises and said oil and gas lease granted the Federal Oil & Development Company, and now held in trust by said defendants, and each of them, as trustees for this plaintiff as a cotenant of the defendants in said leased premises. (R. 19-20.)

That neither this plaintiff nor the heirs of George McManus have ever personally applied for or received any oil or gas leases under the provisions of said Act of Congress of February 25, 1920. That this plaintiff has not been guilty of any fraud, or had any knowledge or reasonable ground to know of any fraud in connection with said mining claim, and has acted honestly and in good faith. (R. 20.) It is further alleged in said bill that by reason of all the matters and facts hereinbefore set forth the said defendants are estopped to deny the right and title of this plaintiff to an undivided one-eighth interest in and to the

said leased premises and the oil and gas lease covering the same, and plaintiff expressly pleads all the foregoing matters and facts by way of estoppel against the defendants. (R. 20.) Plaintiff expressly offers to do equity in the premises, and declares himself ready and willing to do and perform any and all acts and things that may be required of him by the Court as a condition of granting the relief sought in this action conformable to the rules and practice of equity. (R. 20-21.)

**SPECIFICATION OF THE ASSIGNED ERRORS
INTENDED TO BE URGED.**

1. That the United States Circuit Court of Appeals erred in rendering and entering its judgment of March 28, 1925, affirming the final order of the District Court of the United States for the District of Wyoming, entered on December 16, 1922, dismissing the bill of complaint in this action, the said judgment being contrary to law.
2. That the judgment of the United States Circuit Court of Appeals for the Eighth Circuit rendered and entered herein on March 28, 1925, is erroneous in holding that the cause of action set forth in the bill of complaint herein is barred by the six months statute of limitations contained in the Act of Congress of February 25, 1920, known as the Oil Leasing Act, 41 Stat. at L. 437.
3. That the United States Circuit Court of Appeals erred in not finding the issues for the appellant.
4. That the United States Circuit Court of Appeals erred in not sustaining appellant's first assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (1) That the court erred in sustaining the defendant the Federal Oil and Development Company's motion and the amendment thereto to dismiss the bill of complaint and dismissing the bill.
5. That the United States Circuit Court of Appeals erred in not sustaining appellant's second assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (2) That the court erred in sustaining the defendant The Mountain and Gulf Oil Company's motion and the amendment thereto to dismiss the bill of complaint and dismissing the bill.
6. That the United States Circuit Court of Appeals erred in not sustaining appellant's third assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (3) That the Court erred in rendering and entering its final order of December 16, 1922,

dismissing the bill of complaint in this action, the said order being contrary to law.

7. That the United States Circuit Court of Appeals erred in not sustaining appellant's fourth assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (4) That the court erred in rendering judgment upon the pleadings dismissing the bill of complaint in this action.

8. That the United States Circuit Court of Appeals erred in not sustaining appellant's fifth assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (5) That the final order dismissing the bill of complaint herein is erroneous in holding that the bill of complaint does not state facts sufficient to constitute a cause of action.

9. That the United States Circuit Court of Appeals erred in not sustaining appellant's sixth assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (6) That the final order dismissing the bill of complaint is erroneous in holding that the cause of action set forth in the bill of complaint is barred by the statute of limitations of the State of Wyoming.

10. That the United States Circuit Court of Appeals erred in not sustaining appellant's seventh assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (7) That the final order dismissing the bill of complaint is erroneous in holding that the plaintiff and his grantors had been guilty of laches in not sooner asserting their right and title to the property in controversy.

11. That the United States Circuit Court of Appeals erred in not sustaining appellant's ninth assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (9) That the final order dismissing the bill of complaint is erroneous in holding that there has been a final and binding adjudication of the matters and things set forth in the bill of complaint herein by the

Secretary of the Interior of the United States, against all rights claimed by the plaintiff.

12. That the United States Circuit Court of Appeals erred in not sustaining appellant's tenth assignment of error on the appeal from the District Court, which assignment is as follows, to-wit: (10) That the final order dismissing the bill of complaint in this action is erroneous in holding that the United States of America is an indispensable party defendant to the equitable and complete determination of the cause of action set forth in the bill of complaint.

(R. 65-66-67.)

BRIEF OF ARGUMENT

The appellant having been the plaintiff in the Court below, and the appellees the defendants, the parties will hereafter be referred to in this brief as plaintiff and defendants. The argument that follows is applicable to all the Specifications of Error.

Plaintiff in this action bases his right to recover an undivided one-eighth interest in the Southeast quarter of Section 13, Township 40 North, Range 79 West, in Natrona County, Wyoming, located and known as the O'Glase oil placer mining claim, and in the oil and gas lease granted thereon by the United States to the defendant the Federal Oil & Development Company, on three distinct grounds.

1. That the plaintiff is the successor in interest of George McManus, one of the original locators of said O'Glase oil placer mining claim, and his heirs, who were at the time of the defendant the Federal Oil & Development Company's application for an oil and gas lease thereon in August, 1920, co-owners and tenants in common of said premises with the defendants; and that the plaintiff is still such tenant in common with the defendants. The admitted facts in the record in this case show that the title of George McManus has never been divested, either by conveyance, or by forfeiture, or by abandonment, or by operation of law. The colocators and co-owners of a mining claim are tenants in common under the law, hold by unity of interest and possession, and the possession of one is presumed to be for the possession of all. Each co-owner of a mining claim is a cotenant of the premises with the other, and any application for an oil and gas lease on the mining claim made by one of the co-owners, not naming or excluding from said application his other co-owners and cotenants, is in law the application of the excluded cotenants, and any oil lease on the premises granted by the United States to such applicant is held by the lessee as trustee of the undivided interest of the other co-owners and cotenants who are not

named in such application and lease, and are excluded therefrom, and the lease or title thus obtained by such tenant in common from the United States inures to the benefit of his co-owners and cotenants, and creates a trust that may be enforced by action in any court of competent jurisdiction, and such trust may be enforced without any allegations of fraud, or mistake of law, as the authorities hereafter cited will show. The defendant the Federal Oil & Development Company made its application for an oil and gas lease under the provisions of Section 18 of the Oil Leasing Act of February 25, 1920, c. 85, 41 Stat. 441, (R. 8.) alleging that it held said land under a placer mining location initiated by George McManus and his seven co-locators on January 11, 1887, by location and entry thereof under the then existing placer mining laws. It was on this very location and title, which the defendants in part hold in trust, that the defendant the Federal Oil & Development Company proceeded to obtain, and did procure, the oil lease, and the lease gives effect to the location with the trust attached. The application of this co-owner was made within the time prescribed by Section 18 of the Act. In law, the defendant the Federal Oil & Development Company's application inured to the benefit of the heirs of George McManus, as the defendant's cotenants; the defendant's application was their application; the defendant's rights were their rights; and the presentation of its application for an oil and gas lease was a presentation of an application for the benefit of the McManus heirs to whatever undivided interest they were entitled to in the mining claim. Under that application the oil lease was granted, and the claim of the plaintiff in this action is not adverse or hostile to the possessory mining title upon which the application for the lease was and had to be made, but is a part of that title, and the trust which is sought to be enforced in this action follows the application and lease made and issued upon the possessory mining title of which they are a part, and under the authority of the decision

of this Court in the case of *Turner v. Sawyer*, 156 U. S. 525, it is not necessary for the plaintiff to do anything more than to show and establish his interest and title as a co-owner and tenant in common with the applicant, and thereby establish his right to the relief demanded in this action.

2. The plaintiff also relies upon the inuring clause found in Section 18 of the said Minerals Leasing Act of February 25, 1920, c. 85, 41 Stat. 443.

3. Mistake of law.

DIVISION ONE

THE RIGHTS AND ESTATE CREATED BY A VALID MINING LOCATION.

The following statement of the law on this subject is taken from the opinion of this Court in *Union Oil Co. v. Smith*, 249 U. S. 337, 349:

“By Sec. 2319 of the U. S. Revised Statutes, all valuable mineral deposits in lands belonging to the United States are declared to be ‘free and open to exploration and purchase, and the lands on which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.’ By Sec. 2320 it is declared: ‘No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.’ By Sec. 2322 of the Revised Statutes, locators of mining claims on the public domain, ‘so long as they comply with the laws of the United States and the state, territory and local regulations and are not in conflict with the laws of the United States governing the possessory title, shall have the exclusive right of possession of enjoyment of all the surface included within the lines of the location, and of all veins,’ etc. By Revised Statutes, Sec. 2324: ‘The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory, in which the district is situated, governing the location, manner or recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. * * * On each claim located after

the tenth day of May, 1872, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, 1874, and each year thereafter, on each one hundred feet in length along the vein until the patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location.' "

"Sec. 2325 and sections following permit a patent to be obtained for a mineral claim, and regulate the procedure. By Sec. 2325 the applicant for patent is required (among other things), to file 'a certificate of the United States Surveyor General that five hundred dollars' worth of labor has been expended or improvements made upon the claim by themselves or grantor;' and, upon his compliance with this and other requirements, if after publication of notice for sixty days, no adverse claim is filed, or (Sec. 2326) such claim, having been filed, has proceeded to adjudication in a court of competent jurisdiction with result favorable to the applicant, upon a payment of five dollars per acre and appropriate fees, a patent is issued for the claim or such portion thereof as has been decided to be in the rightful possession of the applicant. By Sec. 2329 of the Revised Statutes, placer claims are made subject to entry and patent under like circumstances and conditions and under similar procedure as are provided for lode claims."

"Under this legislation petroleum for many years was regarded as a mineral, although not specially mentioned as such, and claims to oil lands were disposed of by the

Land Department under the provisions of law relating to placer claims, with a single exception afterwards overruled. *Re Union Oil Co.*, 23 Land Dec. 222, decided August 27, 1896; *re Union Oil Co. (On Review)* 25 Land Dec. 351), decided November 6, 1897. It was in order to obviate the effect of the former of these two decisions that Congress passed the Act of February 11, 1897 (Chap. 216, 29 Stat. at L. 526, Comp. Stat. 1916, Sec. 4635), which declared: 'That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the law relating to placer mineral claims;' with a proviso saving petroleum land theretofore filed upon, claimed or improved as mineral and not yet patented. *Burke v. So. Pac. R. Co.* 234 U. S. 669, 678."

"It is clear that in order to create valid rights or to initiate rights as against the United States, a discovery of mineral is essential. Rev. Stat. Sec. 2320; *Waskey v. Hammer*, 223 U. S. 89, 90. Nevertheless, Sec. 2319 extends an express invitation to all qualified persons to explore the vacant and unappropriated lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery, the promise of a full reward. Those, who, being qualified, proceed in good faith to make such exploration and enter peaceably upon vacant land of the United States for that purpose, are not treated as trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals and some occupancy of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a bona fide and qualified prospector is universally regarded as a necessity. It is held that upon the public domain, a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards dis-

covery, he is entitled—at least for a reasonable time—to be protected against forcible, fraudulent and clandestine intrusion upon his possession. *Zollars v. Evans*, 5 Fed. 172, 173; *Crossman v. Fendery*, 8 Fed. 693, 694; *Johanson v. White*, 160 Fed. 901; *Hanson v. Craig*, 161 Fed. 861, 863; *Gemmell v. Swain*, 28 Mont. 331; *New England & C. Oil Co. v. Congdon*, 152 Cal. 211; *Whiting v. Straub*, 17 Wyo. 119, 123; *Phillips v. Brill*, 17 Wyo. 26, 38.”

“But, by the provisions of the Revised Statute above cited, a discovery of mineral by a qualified locator upon unappropriated public land initiates rights much more substantial as against the United States and as against the world. If each locator marks and records his claim in accordance with Sec. 2324 and the local laws and rules and regulations, he has, by the terms of Sec. 2322, an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for a patent or seeking to obtain title to the fee; subject, however, to the performance of the annual labor specified in Sec. 2324, for upon his failure to do this the claim is open to relocation by others at any time before resumption of work upon it by the original locator.”

Union Oil Co. v. Smith, 249 U. S. 337, 339

Oscamp v. Crystal M. Co., 58 Fed. 293, 295 (8th CCA)

Hammer v. Garfield Min. Co., 130 U. S. 291

Lacey v. Woodward, 5 New Mex. 583

McCarthy v. Speed, 11 S. D. 362.

O'Connell v. Pin. G. M. Co., 140 Fed. 854 (9th CCA)

McCulloch v. Murphy, 125 Fed. 150

Book v. Justice Min. Co., 58 Fed. 106, 117

“If not content to rest upon the rights conferred by Sec. 2322, the qualified locator may obtain a patent for his claim by complying with the conditions prescribed by Sections 2325 and 2326. But, even without patent, the possessory right of a qualified locator after discovery of minerals on the claim is a property right in the full sense, unaffected

by the fact that the paramount title to the land is in the United States (Rev. Stat. Sec. 910, Comp. Stat. 1916, Sec. 1532), and it is capable of transfer by conveyance, inheritance or devise."

- Union Oil Co. v. Smith, 249 U. S. 337, 349
- Forbes v. Gracey, 94 U. S. 762, 763, 767
- Belk v. Meagher, 104 U. S. 279, 283, 285
- Del Monte M. & M. Co. v. L. Ch. M. & M. Co., 171 U. S. 55
- Elder v. Wood, 208 U. S. 226, 232
- Chambers v. Harrington, 111 U. S. 350, 353
- Erwin v. Perego, 93 Fed. 608, 611 (8th CCA)
- Gwillim v. Donellan, 115 U. S. 45
- Clipper Min. Co. v. Eli Min. Co., 194 U. S. 220, 224
- Noyes v. Mantle, 127 U. S. 348
- Manuel v. Wulff, 152 U. S. 511
- Elder v. Horseshoe Min. Co., 194 U. S. 248, 256
- Con. Mut. Oil Co. v. U. S., 245 Fed. 521, 527 (9th CCA)
- Rooney v. Barnette, 200 Fed. 700, 710 (9th CCA)
- Reed v. Munn, 148 Fed. 757 (8th CCA)
- O'Connell v. Pinnacle G. M. Co. 140 Fed. 854 (9th CCA)
- Stenfjeld v. Espe, 171 Fed. 825, 828 (9th CCA)
- Mt. Rosa M. & M. Co. v. Palmer, 26 Colo. 56

"Actual and continuous occupancy of a valid mining location based upon discovery is not essential to the preservation of the possessory right. The right is lost only by abandonment, as by nonperformance of the specified labor required by R. S. Sec. 2325."

- Union Oil Co. v. Smith, 249 U. S. 349
- Belk v. Meagher, 104 U. S. 279
- Swanson v. Sears, 224 U. S. 180
- Farrell v. Lockhart, 210 U. S. 142
- Bradford v. Morrison, 212 U. S. 389, 394
- Becker v. Long, 196 Fed. 722 (9th CCA)
- Oscamp v. Crystal R.M. Co., 58 Fed. 293, 295 (8th CCA)
- Lacey v. Woodward, 5 New Mex. 583
- McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 593
- McCulloch v. Murphy, 125 Fed. 150
- Justice Min. Co. v. Barclay, 82 Fed. 554, 559
- Book v. Justice Min. Co., 58 Fed. 106, 117

The Eighth Circuit Court of Appeals, speaking through Circuit Judge Sanborn, in *Erwin v. Perego*, 93 Fed. 611, and in *Reed v. Munn*, 148 Fed. 757, has said:

“The acts of congress prescribed two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. (And the same rule is by the statute made applicable to placer mining claims.) They are the discovery upon unappropriated public land of the United States, within the limits of his claim, of a mineral-bearing lode, and the distinct marking of the boundaries of his claim, so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but, when these requirements have been complied with, the land is no longer public, but the possession, the right to the possession, and the right to acquire the title are irrevocably vested in the locator.”

Erwin v. Perego, 93 Fed. 608, 611

Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 677

Book v. Mining Co., 58 Fed. 108

Jupiter M. Co. v. Bodie Cons. Min. Co., 11 Fed. 666, 680

Zollars v. Evans, 5 Fed. 172, 175

McGinnis v. Egbert (Colo.), 5 Pac. 652, 655

“This character of property possesses the quality of any other possessory title to land. It passes by inheritance, sale, mortgage and execution sale. Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. So long as the locator or his assignee performs the required amount of work, his right of possession is exclusive against every person and against the United States. He may never obtain the patent, but when it does issue, it has relation back to the location. For the purpose of attack and defense he is the owner, and when this title passes from him to an assignee or grantee, it is protected in the hands of such

assignee or grantee by the registration statutes of the state against an equitable claim thereto or interest therein not of record and unknown at the time of the transfer."

Reed v. Munn, 148 Fed. 757 (8th CCA)

U. S. Rev. Stats., Sec. 910

McFeters v. Pierson, 15 Colo. 201, 24 Pac. 1076

Hughes v. Devlin, 23 Cal. 502

Forbes v. Gracey, 94 U. S. 767

Belk v. Meagher, 104 U. S. 283

Manuel v. Wulff, 152 U. S. 511

St. Louis M. Co. v. Mont. M. Co., 171 U. S. 655

"A valid mining location, although unpatented, is a grant, and the estate enjoyed is in the nature of an estate in fee. It is an appropriation of land by the locator to the exclusion of all others."

Stenfjeld v. Espe, 171 Fed. 825, 828 (9th CCA)

The Eighth Circuit Court of Appeals, speaking through Judge Thayer, made the following statement of the law:

"In *Belk v. Meagher*, 104 U. S. 279, 283, it was held, after much consideration, that a mining location when perfected according to the statutes of the United States and local laws and regulations, 'is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent,' and that there is nothing in the law under which such property is acquired 'which makes actual possession any more necessary for the protection of the title acquired to such claim by a valid location than it is for the protection of any other grant from the United States.' It was furthermore held in that case that a failure to do the requisite amount of annual development work on a claim under Section 2324 of the Revised Statutes of the United States simply renders the claim subject to relocation by third parties, after the lapse of the year, and not before, and that such right of relocation is itself lost, and the original owner is restored to all of his rights, if he

enters without force, and resumes work, before a relocation is perfected by any third party. * * * In the early days of mining, before the adoption of any laws on the subject of mining locations, there may have been such a thing as a title to a mining claim that was so entirely dependent upon possession that it ceased to exist when actual possession of the claim ceased; but at the present time the title to a well-located mining claim is not of that precarious character, for the reason that it is not exclusively dependent upon possession, but rests upon a statutory grant. As was said in *Belk v. Meagher*, *supra*, actual possession is no more necessary to protect the title to a mining claim than it is to protect the title to property acquired under any other grant from the United States. The necessary conclusion seems to be that neither the failure of the owner to occupy or to work his claim during a given year will operate to divest him of his title, and to confer it upon an other."

Oscamp v. Crystal R. M. Co., 58 Fed 295, 296

"When the location is made by two or more, they become co-owners, and one or more may do the required work upon the claim, and thus perform the condition, and thereby continue the right of themselves, as co-owners, to the exclusive possession of the claim."

Elder v. Horseshoe M. Co., 9 S. D. 636
S. C. affirmed in 194 U. S. 248

"A cotenant will not be permitted to question the common title upon a contest between him and his cotenants."

Union Con. Min. Co. v. Taylor, 100 U. S. 37, 42
Cedar Min. Co. v. Yarwood, 27 Washington 271
Bornheimer v. Baldwin, 42 Cal. 379
Olney v. Sawyer, 54 Cal. 379
McCarthy v. Speed, 11 S. D. 362
Freeman on Cotenancy (2nd Ed.) Sec. 152

"The federal act in relation to the performance of annual labor says nothing as to the person by whom it shall be performed. The obvious purpose is to exact work as an evidence of good faith on the part of the owner, and also to discourage the holding of mining claims without development or intention to develop, to the exclusion of others who could and would improve such ground if they had the opportunity. Manifestly, the annual work must be performed by the owner, at his instance, or by someone in privity with him, or by someone who holds an equitable or beneficial interest in the property. Work by such a person will inure to the benefit of the claim."

Wailes v. Davies, 158 Fed. 672

Affirmed by 9th Cir. Court of App. in 164 Fed. 297

Jupiter Min. Co. v. Bodie Con. Min. Co., 11 Fed. 666

Book v. Justice Min. Co., 58 Fed. 106

Godfrey v. Faust, 18 S. D. 567, 571

Musser v. Fitting, 148 Pac. 536

Eberle v. Carmichael, 8 N. M. 169

Anderson v. Caughey, 3 Cal. App. 22

Dye v. Crary, 13 N. M. 439

Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673

Nesbitt v. DeLamar's Nev. G. M. Co., 24 Nev. 273

2 Lindley on Mines, Sec. 633, 666

Yarwood v. Johnson, 29 Wash. 643.

A valid and subsisting mining claim is a conditional fee based upon a condition subsequent, to-wit; the doing of the annual assessment work, a failure to perform which forfeits the locator's interest in the claim only when followed by a valid re-location.

Rev. Stats. U. S., Sec. 2324

Oscamp v. Crystal Min. Co., 58 Fed. 293 (8th CCA)

Bingham Copper Co. v. Ute Copper Co., 181 Fed 748

Lacey v. Woodward, 5 New Mex. 583, 25 Pac. 785

Co-operative C. & G. Min. Co. v. Law, 65 Ore. 250

Lakin v. Sierra Buttes Min. Co., 25 Fed. 343

Hammer v. Garfield Min. Co., 130 U. S. 291

O'Connell v. Pinnacle G. M. Co., 140 Fed. 854 (9th CCA)

Lindley on Mines (3d Ed.) Secs. 624, 642, 643, 644, 645-407
Madison v. Octave Oil Co., 154 Cal. 768
McCarthy v. Speed, 11 So. Dak. 362
Field v. Tanner, 32 Colo. 278
Wilson v. Freeman, 29 Mont. 470
Little Gunnell Min. Co. v. Kimber, Fed. Cas. No. 8, 1402

“By Section 2329 Rev. Stats. of U. S. placer claims are subject to entry and patent ‘under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.’ The purpose of this section is apparently to place the location of placer claims on an equality both as to procedure and rights as lode claims.”

Clipper Min. Co. v. Eli Min. Co., 194 U. S. 222, 227
Sweet v. Webber, 7 Colo. 443, 449
Mt. Rosa M. & M. Co. v. Palmer, 26 Colo. 56
Carney v. Arizona G. M. Co. 65 Calif. 40
Morgan v. Tillotson, 73 Calif. 520

The allegations of the bill of complaint are explicit and direct to the fact that George McManus and his seven colocators made a discovery of petroleum mineral oil and in certain and substantial quantities on the vacant and unappropriated public domain of the United States included in the Southeast Quarter of Section 13, Township 40 North, Range 79 West (R. 2.); that they thereafter staked the said premises, and conformed the exterior boundary lines of said claim to the legal subdivisions of the public lands as shown by the United States surveys, posted thereon a notice of discovery containing the name of the claim, to-wit, the O’Glase, and the names of the locators, the date of the discovery, the number of acres claimed, and thereafter and within ninety days of the date of discovery recorded a proper location certificate in the office of the County Clerk of Carbon County, Wyoming. (R. 3.) That George McManus and his colocators have complied with all requirements of the laws of the United States, of the Territory and State of Wyoming, and with the local customs or rules of

miners in the mining district in which said placer oil mining claim is located, as to the amount of labor required each year on the said oil placer mining claim by performing or causing to be performed thereon not less than one hundred dollars' worth of labor, or improvements made, during each year since the year 1887 down to and including the year 1920. (R. 4.) It is averred in the bill of complaint that McManus and his colocators and co-owners were and continued to be in the actual, open, exclusive and uninterrupted possession, without any adverse claim being made thereto, of the said O'Glase oil placer mining claim, from the date of the discovery thereof on January 11, 1887, down to and including the date of the Executive Order of Withdrawal of September 27, 1909, and that more than five hundred dollars' worth of labor had been expended or improvements made on said oil placer mining claim prior to the said Executive Order of Withdrawal of September 27, 1909, and that McManus and his colocators and co-owners have remained in the actual, exclusive, notorious, continuous and undisturbed possession of the said O'Glase oil placer mining claim from the time of its location down to the present time. (R. 4-5.) All these facts stand as admitted on this record by the motion to dismiss filed by the defendant herein. It is also an admitted fact on this record that the defendant in its application for an oil and gas lease on these premises, based their right to obtain such lease on the location made by George McManus and his colocators of the said O'Glase oil placer mining claim on January 11, 1887. (R. 8.)

THE RIGHTS OF GEORGE McMANUS AND HIS SUC-
CESSORS IN INTEREST HAVE NEVER BEEN
FORFEITED BY THE STATUTORY PRO-
CEEDINGS PROVIDED FOR BY SEC-
TION 2324 OF THE UNITED
STATES REVISED
STATUTES

Sec. 2324 of the U. S. Revised Statutes provides: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required herein, the co-owners who have performed the labor or made the improvements may, at the expiration of the year give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days and if at the expiration of ninety days after such notice in writing or by publication, such delinquent shall fail or refuse to contribute the proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

The allegations of the bill of complaint are specific and direct to the effect that the title and interest of George McManus, and his successors in interest, to the premises in controversy have never been forfeited in any manner whatsoever; (R. 6.) and that the said George McManus during his lifetime never sold, granted and conveyed the said premises, and never executed any deed, instrument or conveyance, selling, transferring or conveying his interest and title in said premises, or any part thereof, to any person or corporation whatsoever; (R. 7-8.) and that the other colicators and co-owners with the said George McManus in the said O'Glase oil placer mining claim have never asserted against him and his heirs any adverse interest, estate or possession in and to the O'Glase oil placer mining claim

from the time of its said location on January 11, 1887, down to the present time. (R. 4-5.) Thus the record shows that the statutory proceedings for forfeiture given to co-owners as a remedy against a co-owner who fails to perform or contribute his proportionate share of the assessment work, has never been invoked by any of the original colocators and co-owners and their successors and privies in interest in said claim. (R. 6.) All the foregoing facts stand as admitted on this record on the defendant's motion to dismiss. The purpose of the statutory provision hereinbefore quoted is to afford a speedy, convenient and effective method of taking from one cotenant his interest and giving it to another without the interference of courts or juries, providing the statutory notice is properly given and served, actually or by publication, on the delinquent co-owner. The bill of complaint in this case explicitly negatives any such proceeding, and its direct allegations of these facts stand as admitted.

In considering this statute, this Court in the case of *Elder v. Horseshoe Mining Co.*, 194 U. S. 248, 255, has said:

"This statute provides a summary method for the purpose of assuring the proper contribution of co-owners among themselves in the working of the mine, and it provides a means by which a delinquent co-owner may be compelled to contribute his share under the penalty of losing his right and title in the property because of such failure."

In the case of *McCarthy v. Speed*, 11 S. D. 362, 370, 77 N. W. 590, affirmed by this Court in *Speed v. McCarthy*, 181 U. S. 272, 276, the Supreme Court of South Dakota, in considering this statute, has said:

"The Federal statutes provide a most arbitrary and summary manner, commonly called 'advertising out,' in which one owner of a mining claim may compel his co-owners to contribute their share of assessment work, or cease to have any interest in the claim. An adequate method is thus provided for enforcing the rights of co-owners in respect

to the development of mining property,—one that should satisfy the demands of all persons who desire to act fairly with their business associates.”

The defaulting co-owner is not personally responsible for any part of the assessment work, but the remedy given in this section is exclusive.

McDaniel v. Moore, 19 Idaho 143

The possession of a mining claim by one cotenant is possession by all cotenants, and the failure of one cotenant to perform his share of the assessment work does not thereby forfeit his possession.

Faubel v. McFarland, 144 Cal. 717
 Union Mining Co. v. Taylor, 100 U. S. 37, 40
 Van Valkenburg v. Huff, 1 Nev. 142
 Lockhart v. Leeds, 10 N. Mex. 568, 597
 O'Hanlon v. Ruby Min. Co., 48 Mont. 65
 U. S. Rev. Stats. Section 2324
 Royston v. Miller, 76 Fed. 50, 53
 Hunt v. Patchin, 35 Fed. 816

“As between the locator and the general government the failure to do annual assessment work does not result in a forfeiture. In other words it is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate a title to the same property. * * * To otherwise express our views, it might be said that after a valid location the title thus acquired remains so, whether the annual labor is performed or not, until forfeited or abandoned.”

Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 958.

The forfeiture is not complete until someone else enters with intent to relocate the property, and a relocation has been made. It is the entry of a new claimant with intent to relocate the property, and not mere lapse of time, that

terminates the right of the original claimant. Forfeiture will only ensue upon the lapse of the statutory period, upon failure to represent the claim, and upon entry and location by another.

- Cunningham v. Pirung, 9 Ariz. 62, 80 Pac. 329
Snowy Peak M. Co. v. Tamarack Co. 17 Ida. 630
Wilson v. Freeman, 29 Mont. 470
McCarthy v. Speed, 11 S. D. 362
2 Lindley on Mines Secs. 643, 645, 651
St. John v. Kidd, 26 Cal. 263
Bell v. Bed Rock Min. Co. 36 Cal. 218
McKay v. McDougall, 25 Mont. 258, 264
Knutson v. Friedlund, 56 Wash. 634
Upton v. Santa Rita M. Co. 14 N. M. 96
Coleman v. McKenzie 29 L. D. 359
Wilson v. Champagne Min. Co. 29 L. D. 491
Barklage v. Russell, 29 L. D. 401, 402
In Re Wolenburg, 29 L. D. 302, 304
Marburg Lode Mining Claim 30 L. D. 202-6
2 Lindley on Mines, Sec. 624

The doing of the annual labor is not a condition precedent to the obtaining of a patent.

Nielson v. Champagne M. Co. 29 L. D. 491, 493

Nor has the land department anything to do with the determination of the question.

- Gaffney v. Turner, 29 L. D. 470, 474
Cleveland v. Eureka No. 1 G. M. Co. 31 L. D. 69, 71
Par. 53, Departmental Regulations

Mr. Lindley, in discussing the question of forfeiture to co-owners, under the provisions of Section 2324 of the Revised Statutes of the United States, states fully the legal rights and relationship existing between colocators and co-owners of an unpatented mining claim as defined by the Courts, in language too clear to be mistaken as to what are the rights and relationship of the colocators and co-owners

of such mining claims, in Section 246 of his work on Mines, from which we quote as follows:

“In order, therefore, that the interest of a cotenant may be forfeited it is essential—

1. That the relationship of cotenancy exists.
2. That the entire work shall have been performed by one or more of the cotenants.
3. That the delinquent cotenant or his successors in estate has failed to contribute his proportion after service of personal notice or by publication, as required by law.

“It is quite obvious that one who does not occupy the status of a cotenant, e. g., a mere lienholder or a stockholder of a corporation, or the superintendent of a mining company using his own name for that purpose, cannot avail himself of the benefit of the statute. Parties, however, who succeed to the interest of a cotenant who has performed the work, may obtain forfeiture by giving the notice, and otherwise complying with the statute.”

“Where cotenants convey to a trustee, notices signed by the beneficial owners—original cotenants—have been held sufficient. Necessarily the work must have been actually done, and there should have existed the necessity for doing it to protect the property. Where performance is not required during any given year, the mere doing of the work for that year will not avail the working cotenant as the basis of forfeiture. One who does assessment work on an association placer mining claim for which he is paid by one of the part owners, has no right to enforce forfeiture of the interest of another part owner for failure to contribute. The death of the cotenant performing the labor would not deprive his personal representatives of the right to obtain forfeiture, nor would the death of the delinquent co-owner prevent the proceedings under the statute against the heirs or personal representatives.”

“As the law requires the work to be done in order to save the property from forfeiture through relocation it would seem beyond question that there is an implied contract on

the part of each cotenant to reimburse his co-owner for expenditures made by him to protect the property for a common benefit. A partial performance by one co-owner will not save his interest. Representation is a unit, and as one cotenant in order to protect his interest in the location, may be compelled to expend more than his just share, those associated with him should be compelled to contribute their respective proportions. Failing so to do, the one performing the labor or making the required expenditure would have his right of action against the delinquent co-owners. The right of one cotenant to contribution from others for expenditures made in removing a common burden is well settled, but this remedy is in personam and would not enable the working cotenant to secure the interest of the delinquent, except by suit on the implied promise, judgment and sale under execution. *If the working cotenant seeks to effectuate a forfeiture, the only method is that outlined in the statute and this method must be strictly pursued.* A proceeding by which the interest of a delinquent co-owner is forfeited to such of his cotenants as performed the work may be said to be in the nature of a proceeding in rem, the initial step in such proceeding being the service of a notice upon the delinquent. This service may be personal or by publication. Publication is not required where there is personal service. Where there is personal service and a subsequent publication, the publication is a waiver of the personal service. There is no authority for service by mail."

2 Lindley on Mines (3rd Ed.) Section 646

Knickerbocker v. Halla, 177 Fed. 172, 175 (9th CCA)

We have quoted thus fully from Mr. Lindley's text book, as he is recognized by the courts and the profession alike as being the leading and most authoritative text writer on mining law in the United States, for the purpose of not only showing that the rights and title of George McManus and his successors in interest to the O'Glase oil placer mining claim have never been forfeited, but also for another

purpose, and that is to show that a great master of the mining law could not write a short paragraph relating to the rights and relationship of colocators and co-owners of mining claims inter se without using the word "covenant" to define such rights and relationship at least fifteen times.

"A tenancy in common of a mining claim upon the public domain arises when two or more persons participate in its location."

2 Lindley on Mines, Sec. 788
Morrison's Mining Rights (15th Ed.) 415, 445

GEORGE McMANUS AND HIS HEIRS HAVE NEVER
ABANDONED THEIR INTEREST AND TITLE
IN THE O'GLASE PLACER MINING CLAIM.

The allegations in the bill of complaint, which are admitted by the motions to dismiss, show that George McManus performed or contributed his share of the assessment work up to the time of his death in September, 1901. (R. 4-5-6.) It is true that he could neither perform or contribute his share of the assessment work after his death, and his heirs did not do so as they had no knowledge of their rights in the premises. (R. 6.) The direct allegation is made in the Bill that the right, title, interest and estate of George McManus, sometimes known as George McManes, his heirs, and of this plaintiff, in and to the premises known as the O'Glase oil placer mining claim have never been abandoned. (R. 6.) That is a direct allegation of fact that stands admitted on this record. There has never been any adverse possession of the O'Glase claim by any of the original locators and their successors and privies in interest, including the defendants, until after the issuance of the oil and gas lease covering the O'Glase claim, on or about April 1, 1921. We base this argument upon facts that are indisputable and cannot be denied on this record, as shown in Paragraphs 7, 8, 10, 11, 12, 18, 20, and 32 of the bill of complaint, Record, pages 4, 5, 6, 7, 8, 9, 10, 11, 12, 19. It is also a significant fact that no relocation of the O'Glase oil placer mining claim has ever been attempted by any of the original locators nor by any of their successors and privies in interest, including the defendants in this action.

Mere failure by one colocator to contribute his proportion of the expense of performing assessment work does not deprive him of his interest in the property, and would not be conclusive evidence of his intention to abandon, although it is a circumstance which may be considered in connection with others.

(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had."

In support of the last proposition the court says:

"An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. If the locator remained in possession and failed to do the work provided for by the statute, his interest would terminate under such circumstances. If he convey to another a right which may be thus lost, that conveyance would seem to be equivalent to an abandonment by him of all rights under the statute. What could be better evidence of an intention to abandon than an actual conveyance of his right to another, ceasing to do any work thereon, and giving up of his possession in accordance with his conveyance? The abandonment by simply leaving the land is no more efficacious than conveying his rights and also leaving possession without any intention of returning."

Black v. Elkhorn M. Co., 163 U. S. 445, 450.

"This characterization of the nature of the estate in a perfected mining location does not, at the first glance, seem to blend harmoniously with other declarations of the same tribunal. For example, that court has said:

" 'A mining claim perfected under the law is property in the highest sense of the term—in the fullest sense of the word.' "

Forbes v. Gracey, 94 U. S. 762

Belk v. Meagher, 104 U. S. 279

Manuel v. Wulff, 152 U. S. 505, 510.

Faubel v. McFarland, 144 Cal. 717

Oreamuno v. Uncle Sam M. Co. 1 Nevada 215

Waring v. Crow, 11 Cal. 367, 372

Lapse of time, absence from the ground, or failure to work for any definite period, unaccompanied by other circumstances, are not evidence of abandonment.

Mallet v. Uncle Sam M. Co. 1 Nev. 157, 188

Wade's Am. Min. Law, Sec. 33

Seamen v. Vawdrey, 16 Ves. Jr. 390, 13 Morr. M. Rep. 62

Partridge v. McKinney, 10 Calif. 181, 183

Dodge v. Marden, 7 Or. 456

Buffalo Z. & C. Co. v. Crump, 70 Ark. 525

Valcaldia v. Silver Peak Mines, 86 Fed. 90, 95

McCarthy v. Speed, 11 S. D. 362

2 Lindley on Mines, Sec. 644

Inez Min. Co. v. Kinney, 46 Fed. 832, 835

Plummer v. Hillside Coal Co. 104 Fed. 208

We also quote the following statement as to the law of abandonment from Lindley on Mines:

"In the case of Black v. Elkhorn Mining Co., decided by the supreme court of the United States upon the subject of dower in unpatented mining claims, we find the following statement as to the nature of a locator's title and the circumstances under which it may be extinguished:

To sum up: As to the character of the right which is granted by the United States to a locator, we find—

(1) That no written instrument is necessary to create it. Locating upon the land and continuing yearly to do the work provided for by the statute gives to and continues in the locator the right of possession as stated in the statute.

(2) This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work; or if, being one among several locators, he neglects to pay his share for the work which has been done by his co-owners, his right and interest in the claim may be forfeited to such co-owners *under the provisions of the statute.*

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located."

Gwillim v. Donnellan, 115 U. S. 45, 49

McKinley Creek Co. v. Alaska M. C., 183 U.S. 563, 571

"If the decision in Black v. Elkhorn Mining Company had been promulgated by any court of less dignity than the Supreme Court of the United States, we might deferentially suggest that while the view announced upon the subject of abandonment, as distinguished from forfeiture, was undoubtedly applicable to the early mining tenures as they existed prior to the enactment of the federal mining laws, by legislative construction and judicial interpretation the character of the estate in later years had been raised to such a dignity that it required something more than a mere parol abandonment to terminate it."

"In Bradford v. Morrison, 212 U. S. 389, 396, the supreme court of the United States explains its decision in Black v. Elkhorn M. Co. and disclaims any intention to detract from the dignity of the miner's estate as defined in its earlier decisions. It is also worthy of note that in stating in the Bradford-Morrison case how such an estate may be lost the court says nothing about abandonment. The language of the court is significant:

"Of course (said the court) if the conditions subsequent as the doing of the necessary work were not performed the title would be subject to forfeiture."

"While it is true that no written instrument creating the grant is signed by the grantor, yet in at least thirteen out of the fourteen states and territories subject to the federal mining laws, with the consent and under the sanction of the federal government, a record title is established. 'A statutory writing affecting realty, being in part the basis of a miner's title,' is required."

Pollard v. Shively, 5 Colo. 309, 312

"While as between the government and the locator the title of the latter is equitable, the courts of the mining states have uniformly held that as against everyone else the estate was that of a freehold."

"The supreme court of the United States has said that a written conveyance is not necessary to the transfer of a mining claim, *Union Co. v. Taylor*, 100 U. S. 39, 42, citing, as authority for this doctrine, an early California case, *Table Mt. Co. v. Stranahan*, 20 Cal. 198; but ever since 1860 the supreme court of that state has, by a uniform line of decisions, held that a written instrument was necessary to pass the title to a located mine."

Goller v. Fett, 30 Cal. 481, 484
Felger v. Coward, 35 Cal. 650, 652
Hardenbergh v. Bacon, 33 Cal. 356, 381
Melton v. Lambard, 51 Cal. 258, 260
Garthe v. Hart, 73 Cal. 541, 544
Moore v. Hamerstag, 109 Cal. 122

"The same rule obtains in Montana, *Hopkins v. Noyes*, 4 Mont. 550, and we think we are justified in making the statement that the present time, in every state and territory subject to the federal mining laws, a perfected mining location is treated as real estate, and that the same formalities are required to transmit the title as in case of other real property. The estate is treated as a legal one. It will support the action of ejectment. It may be mortgaged and generally dealt with as if the absolute fee were vested in the locator."

2 Lindley on Mines (3rd Ed.) Section 539

"A parol agreement for its transfer cannot be enforced."

Reagan v. McKibben, 1 S. D. 270

"A conveyance is not an abandonment. Abandonment terminates a right. A conveyance transmits it."

Richardson v. McNulty, 24 Cal. 339

Butte Hdq. Co. v. Frank, 25 Mont. 344

Merced Oil Co. v. Patterson, 153 Cal. 624

Miller v. Chrisman, 140 Cal. 440

Weed v. Snook, 144 Cal. 439

"Upon abandonment of a mining claim the land falls back to the public domain. Such abandonment inures to the benefit of no individual except a relocater."

Badger G.M. Co. v. Stockton G.M. Co., 139 Fed. 838, 841
Brown v. Gurney, 201 U. S. 184, 192

"The supreme court of New Mexico holds that a conveyance is equivalent to an abandonment. This is quite true in a limited sense, as there is an estoppel arising from a conveyance. But a conveyance is not an abandonment because it transmits title to a particular person and an abandonment does not have this effect."

McAlister v. Hutchinson, 12 N. M. 111

"Judge Field, while on the supreme bench of California, announced the doctrine that,—

"The right of the occupant originating in mere possession may, as a matter of course, be lost by abandonment. Where there is title to preserve it there need be no continuance of possession, and the abandonment of the latter cannot affect the rights held by virtue of the former."

Ferris v. Coover, 10 Cal. 589, 632

"And the supreme court of the United States has said that,—

"There is nothing in the act of Congress which makes actual possession any more necessary for the protection of

the *title* acquired to such a claim by a valid location, than it is for any other grant from the United States."

Belk v. Meagher, 104 U. S. 279, 283

"The abandonment of possession is one thing; the abandonment of a right of exclusive possession and enjoyment granted by a statute which is a muniment of title is another. If the estate of the locator is a legal estate, it can only be divested by abandonment when the circumstances are sufficient to raise an estoppel; but when such abandonment is not accomplished by circumstances sufficient to raise an estoppel, no matter how formal the abandonment may be, if it fall short of a legal deed of conveyance, it has no effect whatsoever upon the title."

Tiedeman on Real Property, Section 439

3 Washburn on Real Property, p. 65

"There is another consideration which may add some weight to the contention that such an estate cannot be lost or terminated by mere parol abandonment. The statute which creates and authorizes the grant specifies the conditions under which the estate granted shall be forfeited. The question may be plausibly asked, Can the estate be lost or terminated lawfully in any other manner or for any other cause than that specified in the statute?"

"The answer to this, in the light of the authorities, seems obvious. The ownership of an inchoate right may be abandoned, but the abandonment does not become effectual except in the presence of a relocater. *Madison v. Octave Oil Co.*, 154 Cal. 768; *Swanson v. Kettler*, 17 Idaho 321, 105 Pac. 1059, 1064. This we understand to be the doctrine specifically sanctioned by the Supreme Court of the United States, and in that sense is practically equivalent to the forfeiture provided by the statute where the ground is relocated after the original locator has failed to perform

his work or has expressly or by implication abandoned all rights to his location."

Brown v. Gurney, 201 U. S. 184, 192
Farrell v. Lockhart, 210 U. S. 142, 147
2 Lindley on Mines, Sec. 642

"Abandonment is always a question of intention, but where either abandonment or forfeiture are relied upon the burden of proof rests with the party asserting it."

2 Lindley on Mines, Secs. 643, 644
McCulloch v. Murphy, 125 Fed. 147, 150
Whalen Min. Co. v. Whalen, 127 Fed. 611
Walton v. Wild Goose Co., 123 Fed. 219 (9th C.C.A.)
Wailles v. Davies, 158 Fed. 667, 669
S. C. affirmed 164 Fed. 397
Justice Min. Co. v. Barclay, 82 Fed. 554, 559
Hammer v. Garfield Min. Co., 130 U. S. 291

Where a title stands of record in the name of the real owner, it cannot be presumed that he has made a transfer of it to anyone else; nor is abandonment to be presumed from mere silence. A title to realty is not lost by failure of the owner to assert his claim to it. Other circumstances must concur that would in equity estop him from asserting it to the prejudice of one who has been misled by his silence. No such conditions exist in the present case. The defendants could not have been misled by the silence of the heirs of McManus as the defendants as subsequent purchasers were chargeable with notice of the facts shown by the record long prior to the application for the oil lease. And, the said defendants, and each of them, had knowledge and notice, both actual and constructive, of the right, title, interest and estate of George McManus and his heirs in the premises known as the O'Glase placer mining claim. (R. 18-24-25.) That is an admitted fact on this record.

Crary v. Dye, 208 U. S. 515
Brant v. Virginia Coal Co., 93 U. S. 326

Henshaw v. Bissell, 18 Wall. 255-271

McClung v. Ross, 5 Wheat. 116

Van Wagenen v. Carpenter, 27 Colo. 444

Ballard v. Golob, 34 Colo. 417

Mills v. Hart, 24 Colo. 505

Dye v. Crary, 13 New Mexico 439

In the case of Crary v. Dye, 208 U. S. 521, this Court considered the principle of estoppel by silence, in respect to the title of real property, saying:

“The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. *There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud.* Brant v. Virginia Coal & I. Co., 93 U. S. 326; Hobbs v. McLean, 117 U. S. 567. And in respect to the title of real property, the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. Brant v. Virginia Coal & I. Co. *supra*. These principles are expressed and illustrated by cases in the various text-books upon equitable rights and remedies. Does the conduct relied upon in the case at bar satisfy these principles?”

Crary v. Dye, 208 U. S. 521

The silence of the heirs of McManus, relied upon by the defendants in the case at bar as raising an estoppel against them to assert their claims in the premises, does not come within the principles above laid down. The conduct of the heirs of McManus was not affirmative, but negative. It was silence; not misrepresentation; and was not a disavowal of their title in the premises. And this silence was

a justifiable silence, not induced by any prospect of gain, and not as a means of concealment of their attitude and intentions in the matter. The application for and procurement of the oil lease by the Federal Oil & Development Company, and the subsequent purchase of an interest therein by The Mountain & Gulf Oil Company, was not induced by anything done or said by the heirs of George McManus, nor were the defendants misled or induced to act by the silence of the heirs of George McManus. The defendants had at the time of the application for a lease and long prior thereto, full knowledge and notice of the interest of McManus and his heirs in the premises. (R. 18.) In procuring the lease the defendant applicant acted upon its own judgment, based upon the prospects of value, and its judgment was skilfully exercised, and the prospects of value were not speculative, as the property is situated in a great producing oil field that had been producing oil in great quantities on the adjoining quarter section for a period of more than ten years before the application for a lease was made. On the state of facts alleged in the bill of complaint the Court is asked to believe that the defendants were misled by the silence of the heirs of George McManus; but that the defendants labored an extra day or spent an extra dollar upon the faith of this silence the record signally fails to establish.

THE COLOCATORS AND CO-OWNERS OF A MINING
CLAIM ARE COTENANTS OR TENANTS IN COM-
MON UNDER THE LAW, AND THE PARA-
MOUNT TITLE OF THE UNITED STATES
WHEN ACQUIRED BY ONE OF THE
COTENANTS INURES TO THE
BENEFIT OF ALL

In this brief we do not intend to burden the Court with any subtle disquisition as to what we think constitutes a cotenancy, but we shall quote the holdings of all the courts, federal and state, that have considered the question of cotenancy in connection with mining claims. A good place to start is at the beginning of these decisions. In the case of *Union Consolidated Silver Mining Company v. Taylor*, 100 U. S. 37-42, this Court, speaking through Mr. Justice Strong, said:

“Claiming, as both parties did, under *Payne and Taylor*, the regularity and validity of the location of the mining claim is not in question. And when, in 1862, the plaintiff purchased from one of the owners of the claim, an undivided interest therein and entered into possession with his grantor, and with others deriving title from the original locators, expending large sums in prospecting and developing it (acts which the state statute declares shall constitute adverse possession), he became a tenant in common with those who were the owners. He was such when the *Union Consolidated Silver Mining Company* purchased the interests of the other owners. *By that purchase that Company succeeded to a tenancy in common with him and so did the defendant when it became the purchaser.* And though, after 1863, the plaintiff did no work upon the property, he did not thereby lose the possession he had after his purchase from *Wood*. *The possession of his cotenants was his possession.* They held it for him until he was ousted. That this is the settled rule of law is not denied. And we find nothing in the statutes or decisions to which we have re-

ferred that is at variance with the rule, even when applicable to mining claims. That it does apply is expressly held in *Van Valkenburgh vs. Huff*, 1 Nevada 142. It follows, that neither the defendant nor its grantor had any possession adverse to the plaintiff prior to the time when the ouster was made, and no ouster is found to have been made two years before the suit was brought. The finding that the defendants were in possession more than two years before suit was brought, is not a finding of an adverse possession during all that period, such as to constitute a bar under the Statute of Limitations. Such a bar, therefore, does not exist, unless the ouster took place anterior to the commencement of those two years; and as that is a matter of defense, it should appear affirmatively, to be of any avail."

Union Con. Silver Min. Co. v. Taylor, 100 U. S. 37

This Court again considered the question of the interests of the co-owners of an unpatented mining claim, and cotenancy or tenancy in common, in the case of *Turner v. Sawyer*, 150 U. S. 578-588, which was a suit brought by Sawyer to decree Turner to be holding an undivided five-eighths interest in a lode mining claim as trustee for Sawyer after a patent had been issued to Turner on his sole application therefor, the plaintiff, Sawyer, having been excluded by the defendant, Turner, from the application for patent, and also in the patent issued to Turner by the Interior Department. In that case the appellee Sawyer filed his bill, charging the patent to have been procured by the appellant Turner by false and fraudulent allegations as to ownership, and praying that the title to an undivided five-eighths of the lode be deemed to belong to the appellee, and that Turner convey the same to him. Upon the hearing in the court below it was found that, at the time Turner applied for the patent and received the receipt therefor, he was not the owner of five-eighths of the lode, and it was decreed that he convey the same to the appellee Sawyer. From this decree an appeal was taken to the Supreme

Court by the defendants Turner and McClelland. In affirming the decision of the trial court, the Supreme Court of the United States decided that Turner held an undivided five-eighths interest in the patented claim as trustee for Sawyer, that as both parties claimed under the same location they were cotenants, and that it was unnecessary to allege fraud on the part of Turner in procuring the patent, as their claims were not adverse; that the cotenant who was excluded from the patent application and the receiver's receipt issued thereunder, could not be deprived of his property by the regulations of the Commissioner of the General Land Office, nor could such regulations whereby a party may be allowed to prove his right to enter, oust the jurisdiction of the courts of justice, this Court, speaking through Mr. Justice Brown, saying:

"It seems, however, that Turner, soon after the making and filing by him of an affidavit of non-payment by Sawyer of his alleged proportion of his claim for labor, instituted proceedings in the Land Office at Central City for the purpose of procuring a patent for this lode to be issued to himself alone, and prosecuted said proceedings so far as to obtain on April 13, 1886, a receiver's receipt, so called, issued from the Land Office, and this receipt was recorded in the office of Clear Creek County, Colorado. On April 20th Turner conveyed to appellants Allison and McClelland each an undivided one-fourth interest in the lode. *Whether he procured such receiver's receipt by fraudulent or false representations, as charged in the bill, it is unnecessary to determine.* It is clear, to put upon it the construction most favorable to him, that he acted upon a misapprehension of his legal rights. There is nothing in the record showing that he ever became possessed of Sawyer's interest in the lode. Assuming that, under the proceedings in the Teal suit, he had acquired the legal title to Sanderson's interest, he became merely a tenant in common with Sawyer, and his subsequent acquisition of the legal title from the Land Office inured to the benefit of the other cotenants as well as him-

self. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence, that neither will be presumed to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all. A relaxation of the rule has sometimes been permitted in cases of tenants in common claiming under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the right of his cotenants, to acquire a title to which he must have known, if he had made a careful examination, he had no shadow of right. We think the general rule stated in *Bissel v. Foss*, 114 U. S. 252, 259, should apply; that 'such a purchase' (of an outstanding title or encumbrance on the joint estate for the benefit of one tenant in common) 'inures to the benefit of all because there is an obligation between them, arising from the joint claim and community of interests, that one of them shall not affect the claim to the prejudice of the others.' A title thus acquired, the patentee holds in trust for the true owner, and this court has repeatedly held that a bill in equity will lie to enforce such trust. It is contended, however, that Sawyer is precluded from maintaining this bill by the fact that he filed no claim to the lode in question under Revised Statutes, Sec. 2325. This section declares that 'If no adverse claims shall have been filed with the Register and Receiver of the Land Office within the sixty days of publication' of notice of application for patent, 'It shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of Five Dollars per acre, and that no adverse claim exists; and thereafter no objections from third parties to the issuance of a patent shall be heard, except that it be shown that the applicant has failed to comply with the terms of the statute.' By section 2326, where an adverse claim is filed during the period of publication, it shall be upon oath of the person

or persons making the application and shall show the nature, boundaries, and extent of such adverse claim, etc. In this case there was no conflict between different locators of the same land, and no contest with regard to boundaries or extent of claim such as seems to have been contemplated in these provisions. Turner did not claim a prior location of the same land and made no objection to the boundaries, or extent of Sawyer's claim, *but asserted that he had acquired Sawyer's title by legal proceedings.* The propriety of such claim was not a question which seems to have been contemplated in the 'adversing' of hostile claims. In this particular the case of *Garland v. Wynn*, 61 U. S. 20 How. 6, is in point. In this case it was held that when the Register and Receiver of the public lands had been imposed upon by ex parte affidavits, and a patent has been secured by one having no interest secured to him by virtue of the pre-emption law, to the destruction of another's right, who had a preference of entry which he preferred and exerted in due form, but his right was defeated by false swearing and false contrivance brought about by him to whom the patent was awarded, that the jurisdiction of the court was not ousted by the regulations of the Commissioner of the General Land Office. 'The general rule is,' says Mr. Justice Catron, 'that where several parties set up conflicting claims to property with which a semi-judicial tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate their conflicting claims.' Such was the case of *Comegys v. Vasse*, 1 Pet. 212, and the case before us belongs to the same class of ex parte proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court."

Turner v. Sawyer, 150 U. S. 578, 588.

"This case, as appears by the record, is brought in the name of one of the locators, Ehrhardt, who owns only four-fifths of the claim, but as a tenant in common with Carroll, he can maintain an action of ejectment for the possession of the premises, the recovery being not merely for his benefit but for that of his cotenant, who is equally entitled with him to the possession."

Erhardt v. Boaro, 113 U. S. 527, 537.

In the case of De Lamar's Nevada Gold Mining Company v. Nesbitt, 177 U. S. 523, this court, again speaking through Mr. Justice Brown, said:

"Plaintiff Nesbitt took title to the Fraction mine through a location made May 12, 1892, by W. De Beque, R. Stevens, and A. Borth, who, it appeared, performed all the acts required to make a valid location. Plaintiff claimed that he and George Nesbitt, his brother, had acquired all the right, title, and interest of De Beque and Stevens to this mine through certain judgments recovered in a justice's court against De Beque and Stevens, upon which executions had been issued, and a sale made to the Nesbitt brothers of their interests in the Fraction mine. This left the Nesbitts and Borth the owners of that mine as tenants in common."

De Lamar's Nev. Gold M. Co. v. Nesbitt, 177 U. S. 523.

"In relation to mining it has been held that the remedy in the case of a claim in the nature of that which the plaintiff herein sets up is against the copartner or cotenant, by an action for a breach of his contract or to establish and enforce a trust in the claim relocated against the parties relocating."

Lockhart v. Johnson, 181 U. S. 516-530.

Lockhart v. Leeds, 195 U. S. 427.

The question of whether co-owners of a mining claim are cotenants and stand in a relation to one another of mutual trust and confidence was considered by the Circuit Court of Appeals of the Eighth Circuit in the case of *Stevens v. Grand Central Mining Co.*, 133 Fed. 28, and it spoke in no uncertain terms through Circuit Judge Van Devanter, as follows:

"The general rule that cotenants stand in a relation to one another of mutual trust and confidence, that one will not be permitted to act in hostility to the others in respect to the joint estate, and that a distinct title acquired by one will inure to the benefit of all, applies with full force to the joint owners of a mining claim. A co-owner who amends the location notice, relocates the claim, or procures the issuance of a patent in his name, will not be permitted to thus exclude the other owners and appropriate the claim to himself, but will be declared to hold the right or title thereby acquired in trust for all. Nor will the trust be avoided or its enforcement be defeated merely because a stranger to the original claim participates with the unfaithful co-owner in the proceedings to wrongfully exclude their companions in interest and jointly with him acquires the title to which they are entitled."

Stevens v. Grand Central Min. Co., 133 Fed. 28.
Royston v. Miller, 76 Fed. 50.

The case of *Hunt v. Patchin*, 35 Fed. 816, was a bill in equity to establish a trust in three mining claims in favor of the complainant, and to compel a conveyance to him of the undivided fifty-one sixtieths parts, that had been relocated by a faithless co-owner of the original claims, and an application for patent made, the purchase money paid, and a certificate of entry issued to the defendant. In holding that the plaintiff was entitled to the benefit of the defendant's entry and certificate of purchase to the extent of the trust, Circuit Judge Sawyer said:

“But one other point has sufficient plausibility to require notice. After this bill was filed defendant applied to enter the land as mining ground, advertised in pursuance of the statute, and, no protest having been made, in due time he paid the purchase money, and a certificate of entry was issued to him. It is now insisted, that, as complainant did not protest, and then bring suit to establish his right within the time prescribed by statute, he waived all adverse claims, and the entry is conclusive. But it was on this very title which defendant in part holds in trust, that he obtained his certificates of entry. It was on these relocations, which defendant held in trust, that he proceeded, and the entry gives effect to the relocation, with the trust attached. This suit was pending at the time of application for purchase, to establish, not the legal title, but a trust in it. This claim by complainant of a trust was not adverse to the possessory title upon which the entry was made, but a part of that title, and the trust which had attached before the entry, followed the title upon the entry based upon the possessory title of which it was a part. See *Lakin v. Mining Co.*, 11 Sawy. 238, 25 Fed. Rep. 337. The complainant is entitled to the benefit of this entry to the extent of the trust.”

Hunt v. Patchin, 35 Fed. 816-820.

“The appellants make the contention that the issuance of a patent from the United States to the Nowell Company for the mining claims in controversy was conclusive of the rights of all parties, including the Berner’s Bay Company, and that the appellees waived all claims to said property by failing to adverse the Nowell Company’s application for the patent. It is sufficient to say, in answer to this, that the appellees do not claim adversely to the patent, but under it. The purpose of the present suit is to establish and enforce a trust. The statute providing for adverse proceedings on an application for a patent, has reference

to an adverse claim rising from independent and conflicting locations of the same ground, and not to a controversy between co-owners or others claiming under the same location. In the fact that an application was made for a patent by the Nowells there was nothing to indicate to the Berner's Bay Company, or to any of its stockholders, that the intention was to acquire a title adverse to them."

Nowell v. McBride, 162 Fed. 432-441 (9th C. C. A.)

That the discovery and location of a mining claim, either lode or placer, by several locators, either in person or by agents, makes them cotenants, and vests a right of property in the locators, is a principle that has been laid down by the decisions of all the courts, since the earliest days, and prior to the first enactment of the United States Mining Statute in 1866, and nowhere has this principle been more lucidly stated, and the reasons for its adoption given, than by Chief Justice Sanderson of the Supreme Court of California in the case of *Morton v. Solambo Copper Mining Co.*, 26 Cal. 528, 534, a case decided in 1864, prior to the enactment of the first United States mining statute of July 26, 1866. In that opinion, which has been followed by all the courts, state and federal, since that time, the Supreme Court of California said in part:

"The custom provides that any person who has discovered a vein or lode and desires to locate a mining claim upon it for himself, or for himself and others, may do so by putting up a notice, with his own name and the names of those whom he may choose to associate with him appended thereto, to that effect, designating the extent of his claim, which may amount to three hundred feet for himself and one hundred and fifty feet for each of his associates. Thus the law itself makes the discoverer the agent of those for whom he chooses to act, and makes his act their act regardless of the fact whether they have any knowledge of it or not. The discoverer can only locate three hundred feet for him-

self; and if he locates more he can only do so as the agent of another; and having located for another his power as agent ceases, for beyond the act of location the custom does not authorize him to proceed as agent, and he can thereafter make no change without power to do so from the person whose name he has so used. The act of location being accomplished in the manner designated, the discoverer becomes vested with a mining right to the extent of an undivided three hundred feet and no more, and each of his associates with an undivided one hundred and fifty feet, *and thereafter they hold the claim as tenants in common*, provided that the discoverers *or some of them enter upon and work the same*. It follows that the instruction was correct, and the judgment must be affirmed."

Morton v. Solambo Cop. Min. Co., 26 Cal. 528, 534
Gore v. McBrayer, 18 Cal. 583

That the colocators and co-owners of a mining claim are cotenants, is a principle of law, and rule of property, firmly embedded in the mining jurisprudence of all the western mining states.

The case of Ballard v. Golob, 34 Colo. 417, was an action brought by one Chapman Ballard in the District Court to recover a one-sixth interest in the Ballard lode, situate in Lake County, for an accounting, and for his proportionate share of the net profits realized from the operation of the said property as a mine. On March 18, 1879, W. D. Larremore, N. J. Ballard and the plaintiff located the Ballard lode, each of the said locators having a one-third interest therein; the plaintiff, in the year 1880, executed a deed for a one-third interest in said lode to certain persons who, under contract with him, had sunk the shaft on the lode to a depth of about 200 feet; that prior to the execution of this deed he had acquired by purchase from his brother, Newton J. Ballard, the one-third interest of said Newton in said lode; that prior thereto Larremore had conveyed

his interest in said lode to one Jasper Moon, and that said Moon had conveyed an undivided one-sixth interest of said lode to one Charles F. Gilbert; that prior to the making of the last mentioned deed from Moon to Gilbert the plaintiff and Jasper Moon, being the sole owners of said Ballard Lode, made application in the United States Land Office at Leadville for a patent, said application being in the usual form; that shortly after making said application for patent the said Chapman Ballard conveyed a one-sixth interest in said Ballard lode to Charles F. Gilbert; that afterwards, on October 12, 1885, under said proceedings for patent based upon said application of Jasper Moon and Chapman Ballard, a United States patent for said Ballard lode was issued to C. P. Moon, L. H. Wilmot, A. W. Gilbert, and H. G. Kopplemeyer; after issuance of the patent, Wilmot and Kopplemeyer deeded a five-sixth interest in said Ballard lode to Turnbull and Golob, who went into possession of the lode claiming to be co-owners thereof, and specifically claiming the one-sixth interest of Chapman Ballard in the said lode claim under certain forfeiture proceedings had under the provisions of Section 2324 of the Revised Statutes of the United States, in which the notice of forfeiture was directed "To Charles Walker, A. Ballard, or Whom It May Concern." To this action brought by Chapman Ballard, the defendants interposed the usual defense of limitations, laches, and title under the United States patent, and in considering these defenses the Supreme Court of Colorado said:

"The forfeiture proceedings instituted did not have the effect of divesting plaintiff of his interest in the Ballard lode. His name does not appear in the notice and affidavits. The law (section 2324, Rev. St. U. S.) requires that the co-owner, who has performed the labor or made the improvements, give the delinquent co-owner personal notice in writing, or by publication for the period of 90 days, that his interest will become the property of his co-owner if he fails or refuses to contribute his share of the expenses

incurred. The notice given does not meet the requirements of the law, and it must be held to be invalid as far as the plaintiff, Chapman Ballard, is concerned. The plaintiff, having been one of the original locators and having succeeded to the interest of N. Ballard by deed of conveyance, was entitled to have patent issued to him for such interest in the lode as he had not theretofore conveyed; and when the patentees procured a patent from the government for the entire lode they took the interest that the plaintiff had in trust for him. At the time the patent was issued Ballard owned an undivided one-sixth interest in the lode, and he was not divested of this interest by the act of the federal officials in issuing patent to others, but the patentees took title subject to Ballard's rights, and became trustees for him to the extent of his interest. It was said by Mr. Justice Brown, in *Turner v. Sawyer*, 150 U. S. at page 586: 'It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence, that neither will be permitted to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his cotenants, to acquire a title to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. * * *

A title thus acquired the patentee holds in trust for the true owner, and this court has repeatedly held that a bill in equity will lie to enforce such trust.' And this court has held, following the rule announced by Mr. Justice Brown, that 'obtaining patent from the government for mineral land by a cotenant in his own name is not the purchase of an outstanding adverse title by the cotenant, as that expression is ordinarily used; but, rather, the per-

fection of the common title, which inures to the benefit of the cotenants of the patentee, to which the above rule of cotenancy applies, for the reason that cotenants stand in that relation of mutual trust and confidence towards each other that the title thus acquired by patent the patentee holds as trustee for his co-owners in the premises.'

"Moon, Gilbert, Wilmot, and Kopplemeyer were cotenants of Ballard, they each held undivided interests in the property, and when they took title from the government in their own name they took a one-sixth interest therein in trust for Ballard. *This proposition is not open to dispute*, but the defendants claim in their argument upon the demurrer that the complaint shows that they have been in the possession of the property under claim and color of title made in good faith, and that they have paid taxes thereon for the period of five years, and under the statute of this state they should be adjudged to be the owners of the said property, and that, even though they have not been in the actual possession of the premises, another statute requires that they be adjudged to be the owners of the property because the land was vacant and unoccupied land, and they, under claim and color of title made in good faith, have paid for the period of five years the taxes assessed against the property. These two sections, No. 2923 and No. 2924, respectively, of Mills' Annotated Statutes, were passed in the year 1874. They have since been repealed, and the law concerning the subject is found in the Laws 1893, p. 327, c. 118. If the forfeiture proceedings did not divest Ballard of his interest in the property, *and if obtaining a patent cannot be regarded as an adverse proceeding as between co-owners*, then the payment of taxes by the patentees must be regarded as payment for Ballard."

Ballard v. Golob, 34 Colorado 417

The case of Mills v. Hart, 24 Colo. 505, 52 Pac. 680, was also a case in which the Supreme Court of Colorado con-

sidered the relationship of cotenancy existing between the co-owners of a mining claim before and after patent. The Court held that, by the pleadings in that case, issues were joined upon the following questions: (1) The relationship of cotenancy between the plaintiffs and the individual defendants; (2) acquisition of title by the defendant company, without knowledge or notice of the rights and claims of plaintiffs. We quote the facts found to exist in that case, by the Supreme Court of Colorado, as follows:

“Plaintiffs commenced this action to recover from the defendants an interest in the Nevada and Champion lodes, and the value of ores extracted from the premises, averring that these claims were located April 13, 1880; that they purchased their interest from the locators, and alleged a compliance upon their part, and the part of their grantors, with the laws relative to mining claims; and that, subsequent to such purchase, the defendants, or some of them, in 1886, became the owners, by purchase of the remaining interest therein, and thereafter entered into the exclusive possession of the premises in controversy. The company and defendant J. T. Hart answered that the former was the owner of these properties, and held receiver’s receipt and patent therefor; that it derives its title from relocations, as abandoned property, of the premises described in the complaint, of date January 2, 1882, the work thereon not having been performed for 1881; and allege compliance upon their part and the part of their grantors with the mining laws; that the defendants Perkins, Shreve, Hubbell, and Hart, by mesne conveyances, became the owners of these relocations February 19, 1886, and that subsequently the defendant company became the owner, without notice that the plaintiffs claimed or had any interest therein; that May 11, 1886, the individual defendants above named filed an amended location certificate, without waiver of any rights acquired under the relocations of January 2, 1882, in which the two claims were included as one, named the Champion, and on April 12, 1887, filed application for patent, on which, No-

vember 11, 1891, receiver's receipt, and May 21, 1892, patent, issued to the company."

Upon these facts the Supreme Court of Colorado, declared that the relation of cotenants was established, and that the defendants held the title in trust for the plaintiffs to the extent of their interest therein, the Court saying:

"A purchase by a tenant in common of an outstanding title to the premises ordinarily inures to the benefit of his cotenant. *Mining Co. v. O'Brien*, 22 Colo. 129, 43 Pac. 1016; *Freem. Co-Tenancy*, Sec. 154. A purchase by the individual defendants, or some of them, of an interest in the locations of April 13, 1880, would make the defendants thus purchasing and the plaintiffs co-owners in these locations. During the existence of this relationship, a purchase by such defendants of the title initiated by the relocations of January 2, 1882, would inure to the benefit of their co-owners in the original locations. A purchase by the company from such defendants, with notice of the rights of plaintiffs, would vest the title in the former, burdened with the equities of the latter therein; and the title thus held by the company would be in trust for the plaintiffs to the extent of their interest in the premises. The averments of the pleadings of the plaintiffs as to the time when the individual defendants, or some of them, purchased an interest in the original locations, as, also, the character of their rights in the premises, of which the company was advised at the time it acquired title, are very indefinite; but, for the purposes of this motion, it cannot be assumed that an issue was not joined upon the question of the existence of the relationship of cotenancy between them and some of the individual defendants in the locations of April 13, 1880, at the time the latter purchased the relocations of January 2, 1882, or that issue was not joined upon the question of acquisition of title by the company, with notice of such rights of the plaintiffs in the premises as would preserve their equities therein. With these issues made, the issuance of the patent was not conclusive of the rights of the

parties in the premises. Obtaining patent from the government for mineral land, by a cotenant, in his own name, is not the purchase of an outstanding adverse title by a cotenant, as that expression is ordinarily used, but, rather, the perfection of the common title, which inures to the benefit of the cotenants of the patentee to which the above rule of cotenancy applies, for the reason that cotenants stand in that relation of mutual trust and confidence towards each other that the title thus acquired by patent the patentee holds as trustee for his co-owners in the premises. We do not wish to be understood as holding that the above rule regarding the effect of the acquisition of an adverse title by a cotenant is inflexible. On the contrary, there are exceptions; but, under the issues made by the pleadings, we cannot say that this case falls within any exception to the general rule."

Mills v. Hart, 24 Colorado, 505, 508

The Supreme Court of Colorado in the case of Van Wageningen v. Carpenter, 27 Colorado, 444, 456, in considering this question, also held:

" 'It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence, that neither will be permitted to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all.' Whether such result would follow if it was true, as assumed by counsel for appellant, that the Paris was subject to relocation at the time, and was relocated with the intention and for the purpose of excluding some of the original owners of the Paris, it is unnecessary to determine, since it is clear that those conditions did not exist. It sufficiently appears that the Paris was not at that time open to relocation,—most of the work by the Energetic Mining & Prospecting Company having been done in the year 1880,—and that the relocation was made for the benefit of all owning interests in the Paris. But counsel for appellant also contend that,

notwithstanding the fact that Gill's title to the four-eighteenths interest still remained of record, by reason of his silence and failure to assert his right to the interest it is to be presumed that he had abandoned or disposed of it prior to the relocation of the Paris. We do not think there is any merit in this claim. It certainly is not to be presumed, in the face of the fact that his title to this interest then stood of record in his name, that he had transferred it to any one else; nor is abandonment to be presumed from mere silence. A title to realty is not lost by the failure of the owner to assert his claim to it. Other circumstances must concur that would in equity estop him from asserting it to the prejudice of one who had been misled by his silence. No such conditions are present in this case. In the circumstances of this case, it is clear that the title acquired by the locators of the Pyrenees was impressed with a trust in favor of the owners in the Paris, to the extent of their respective interests in that claim, and that Gill, as the owner of four-eighteenths interests, remained the equitable owner of that interest in the new location, only the naked legal title thereto vesting in the locators in trust for him; and nothing occurred in the subsequent proceedings that in any way affected his right to that interest. The conveyance of this title by Van Wagenen and Havens to appellee was concededly for the purpose of enabling him to procure a patent to the Pyrenees in his name, for the joint benefit of all interested; and it goes without saying that the patent he obtained inured to their benefit, and vested him with the legal title solely as their trustee. While his deed to appellant recites a consideration of \$11,000, it appears by undisputed testimony that, as a matter of fact, it was a voluntary conveyance, and without any consideration whatever. Hence it transferred to her only the legal title to the eleven-eighteenths interest, impressed with the trust that existed in favor of the original beneficiaries. Pomeroy, in his work on Equity Jurisprudence (section 1048), states the rule upon this subject as follows:

'Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed and becomes himself a trustee for the original beneficiary. * * * It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation. It is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a bona fide purchaser for a valuable consideration and without notice.' "

Van Wagener v. Carpenter, 27 Colo. 444, 456

The same ruling on this question was made by the same Court in the case of Franklin Min. Co. v. O'Brien, 22 Colo. 129, 43 Pac. 1016.

The Supreme Court of Montana, in considering this question in the case of Brundy v. Mayfield, 15 Mont. 201, 38 Pac. 1067, said:

"Brundy not being 'advertised out,' and his interest not being forfeited, but, he still owning the same, when application for patent is made by his co-owners the case therefore comes to this point: There are three undisputed co-owners of a mining claim; namely, Mayfield, Upton, and Brundy. Mayfield and Upton apply for and obtain a United States patent to themselves, excluding Brundy. Two questions are therefore left: First. Must Brundy file an adverse claim in the land office (which he did not do), in order to prevent his title being finally acquired to themselves by Mayfield and Upton, through the process of applying for and obtaining a United States patent? If Brundy need not

file such adverse claim, then, second, are Mayfield and Upton trustees for Brundy? Both of these inquiries are fully answered in the last case in the United States supreme court which we have seen upon this subject,—*Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192, a case very similar in its facts to the case at bar. * * * As to Mayfield and Upton being trustees for Brundy, and required to convey to Brundy, the same authority says: ‘Whether he procured such receiver’s receipt by fraudulent and false representations, as charged in the bill, it is unnecessary to determine. It is clear, to put upon it the construction most favorable to him, that he acted under a misapprehension of his legal rights. There is nothing in the record showing that he ever became possessed of Sawyer’s interest in the lode. Assuming that, under the proceedings in the Teal suit, he had acquired the legal title to Sanderson’s interest, he became merely a tenant in common with Sawyer, and his subsequent acquisition of the legal title from the land office inured to the benefit of his cotenants as well as himself. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his cotenants, to acquire a title to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. We think the general rule as stated in *Bissell v. Foss*, 114 U. S. 252, 259, 5 Sup. Ct. 851, should apply,’—that ‘such a purchase (of an outstanding title or incumbrance upon the joint estate for the benefit of one tenant in common) inures to the benefit of all, because there is an obligation between

them, arising from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others. *Rothwell v. Dewees*, 2 Black, 613; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Lloyd v. Lynch*, 28 Pa. St. 419; *Downer v. Smith*, 38 Vt. 464.' A title thus acquired the patentee holds in trust for the true owner, and this court has repeatedly held that a bill in equity will lie to enforce such trust."

Brundy v. Mayfield, 15 Montana 201
Delmoe v. Long, 35 Montana 139

The Supreme Court of the State of Washington also considered this question in the case of *Yarwood v. Johnson*, 29 Washington 643, and from its opinion in that case, we quote as follows:

"The entry of Pete Johnson in the name of William Johnson on the claim in controversy was a mere subterfuge. We are satisfied it was an entry in his own interest, and the use of his brother William's name was a device arranged between Pete and William to deprive the other owners of their interest in the claim. When Pete undertook to relocate this claim in the name of his brother, the relation of cotenancy existed between him, the respondent, and the other co-owners of the property, and, so far as any evidence to the contrary appears, such relationship still continues to exist. Pete Johnson was a co-tenant with this respondent. His possession of this property was the possession of his co-tenants. His entry was their entry. The moment that one co-tenant enters upon property, that constitutes an entry of all. *Here lapse of time does not dissolve this relation.* When he entered upon the property on January 1, 1899, he entered for the benefit of all co-tenants who were interested with him in the claim. And William Johnson knew that the relation of co-tenancy in this property existed between Pete, respondent, and other parties. 'All acts done by a co-tenant, and relating to or affecting the common property, are presumed to have been done by him

for the common benefit of himself and the others. The relation between him and the other owners is always supposed to be amicable, rather than hostile; and his acts are therefore regarded as being in subordination to the title of all the tenants, for by so regarding them they may be made to promote the interests of all. Therefore, as a general proposition, the entry of one co-tenant inures to the benefit of all. * * * The possession or entry of one tenant in common or joint tenant is always presumed to be in maintenance of the right of all, and he shall not be presumed to intend a wrong to his companions, if his acts will admit of any other construction.' *Freem. Co.-Ten. (2d Ed.)* Sec. 166. 'The entry of one co-tenant, as we have shown, is, in the absence of clear proof to the contrary, construed as conferring seisin upon all. And supported by the same reasons, and prevailing to the same extent, is the rule that the continuing possession of a co-tenant, whether the entry was made by himself alone or in connection with his companions, is the possession of all the co-tenants.' "

Yarwood v. Johnson, 29 Washington 643

The question of cotenancy existing between the colocators and co-owners of a mining claim has been considered by the Supreme Court of the State of South Dakota in the case of *McCarthy v. Speed*, 11 S. D. 362, from which case we make the following quotation:

"It being determined that, for the purposes of this action, the Tin Bar claims were valid in their inception, the main controversy is whether, when the annual assessment work has not been done upon a mining claim, one co-tenant therein can relocate the same, and obtain title thereto, not only as against the world, but as against his co-tenants. We are not aware that the precise question here presented has ever been decided by any court of last resort. It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence; that neither will

be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. This principle arises from the privity subsisting between parties having a common possession of the same land, and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their relative position. *Venable v. Beauchamp*, 3 Dana, 321. It has been applied to mining property by the federal supreme court. In a case in that court, where one had acquired an interest in an unpatented claim by purchase at sheriff's sale, and obtained a patent to the entire property to the exclusion of another, who was found to own an interest therein, it was decided that the patentee held the title in trust for his co-tenant; that a court of equity would enforce the trust; and that the excluded co-tenant was not required to adverse the application for patent. *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192. Therefore, the only question to be determined in this connection is whether the relation of co-tenant existed between plaintiff and Franklin when the latter located the Holy Terror and Keystone claims. 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent.' *Belk v. Meagher*, 104 U. S. 279. Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the location thereof. *Belk V. Meagher*, *supra*. Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute, and involves only the question whether the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Original locators may resume work

at any time before relocation. Forfeiture is not complete until some one else has appropriated the property. 2 Lindl. Mines 644; Rev. St. U. S. Sec. 2324. Plaintiff and Franklin continued to be co-tenants so long as the Tin Bar claims continued to exist. They continued to exist until the ground was relocated, and during every instant of that time the latter was, in law, incapable of performing any act in hostility to his co-tenant in reference to the joint estate. Franklin was plaintiff's co-tenant at the time he entered the boundaries of either Tin Bar claim for the purpose of relocating the ground. His entry for that purpose was hostile to his co-tenant unless he intended to relocate for the benefit of all the owners of the Tin Bar claims. It may be that he owed no duty to his co-tenants to represent the claims; it may be that he was at liberty to refrain from performing any act in reference thereto; but, if he elected to act at all, he was bound to act for the benefit of all the owners. His acts of relocation did not terminate the fiduciary relation between himself and the plaintiff, because they were, if done for the purpose of defeating the rights of his co-tenant, in hostility to his interests, and, if they were not done for that purpose, they, of course, operated to the benefit of all the owners. We think the circuit court should have adjudged the defendants to be trustees, and have enforced the trust. This conclusion is not precluded by the language of the federal statutes. They provide that upon a failure to comply with required conditions as to labor or improvements 'the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made.' Rev. St. U. S. Sec. 2324. It is contended that, if congress intended to have the relocater regarded as a trustee under any circumstances such intention would have been expressed in the statute. The contention is not tenable. The trust results from the fiduciary relation of the parties, and not from the operation of the statute. If such relation exists between an original locator and another and he secures

a patent, no one will deny that he may be adjudged to hold the property in trust for such person, or if a relocater sustains such relation to a third person, the latter's rights may be enforced in equity. If this is true, there is no reason for making a different rule as to cotenants. The relocater is permitted by the statute to acquire the property in the same manner that the original locator would have acquired it, but because of his relations to another who may be a cotenant, a mortgagee, or person having no estate in the property, he will be adjudged to hold the title in trust for such person. In all cases of this character the trust depends upon the relation of the parties, not upon the manner in which title is acquired."

McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590.

In McCaul v. Kilpatrick, 46 Mo. 437, it was said:

"The case shows that the parties were tenants in common. The original conveyance of one-fourth of the twenty acres, without designating by metes and bounds, or otherwise localizing the part conveyed, vested in the grantee the title to one undivided fourth of the whole tract, as tenant in common with the grantor; and those who subsequently acquired the grantee's title assumed the same relation to the remaining three-fourths of the title as the original grantor originally held."

McCaul v. Kilpatrick, 46 Mo. 437

Adams v. Frothingham, 3 Mass. 352

Lick v. O'Donnell, 3 California 59

Gibbs v. Swift, 12 Cush. 398

Battel v. Smith, 14 Gray. 499

Davis v. Chapman, 36 Fed. 42, 46

Fielder v. Childs, 73 Ala. 572

Metcalfe v. Miller, 96 Mich. 459

Parsons v. Sharpe, 102 Ark. 611

1 Washburn on Real Property, (6 Ed.) Sec. 876

7 R. C. L., Title, Cotenancy, pp. 815, 816, 817, 818

17 Am. & Eng. Ency. of Law (2nd Ed.), p. 661

Freeman, Cotenancy (2nd Ed.), Sec. 96
4 Kent's Commentaries, 408

Mere lapse of time does not dissolve the relation of cotenancy.

Yarwood v. Johnson, 29 Washington 643
Gillett v. Gaffney, 3 Colo. 362
Van Wagenen v. Carpenter, 27 Colorado 444, 456

The general rule is that one tenant in common cannot deny the validity of the common source of title, while he himself claims the right to possession thereunder.

Cedar Canyon Con. M. Co. v. Yarwood, 27 Wash. 271
Boyd v. Boyd, 176 Ill. 40
Stevens v. Reynolds, 143 Ind. 467
Freeman, Co-Tenancy (2nd Ed.), Sec. 152

The *ratio decidendi* of the foregoing cases, from some of which we have made such ample quotations, shows that the possession of one colocator and co-owner of an association placer mining claim is the possession of all of his colocators and co-owners, and his entry into possession of the claim to do the annual assessment work on the claim, or develop it, unless accompanied by acts constituting a forcible and continuing actual dispossession of his colocators and co-owners, and an unequivocal repudiation of their rights and titles, is the possession of all, and is not adverse to his cotenants. The root of the doctrine that the colocators of a mining claim are cotenants, and that anyone who buys the undivided interest of any of the colocators in the claim thereby becomes a co-owner and tenant in common with the original locators, so unanimously declared by the decisions of all the courts that have considered this question in relation to mining claims and their ownership, is to be found, we may suggest, aside from the general principles of cotenancy applied by the courts to the ownership of other kinds of real estate, in Section 2324 of the Revised Statutes

of the United States, prescribing the necessary acts of location and maintenance required to be done by the locators of mining claims on the public domain in order to become the owners of a vested right therein that is salable, inheritable, taxable, and property in every sense of the word, as is shown by the use of the following statutory language: "Upon the failure of any one of *several co-owners* to contribute his proportion of the expenditures required hereby, *the co-owners* who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent *co-owner* personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditures required by this section, his interest in the claim shall *become the property of his co-owners* who have made the required expenditures." (Italics ours.) This is an indisputable statutory declaration that the colocators of a mining claim and their successors in interest are *owners in common* of the mining claim, that such a claim is recognized as *property*, that the nature of this property is real property, and that its *co-owners* are tenants in common. This is a statutory creation of the relationship of cotenancy between the colocators and *co-owners* of a mining claim, impressed with all the rights and obligations that arise by law from such a legal relationship. That is the doctrine unanimously declared by this Court and all the courts that have considered this question. And that statute is a declaration by Congress that the relationship of *co-owners* and cotenants between the colocators of a mining claim and their successors in interest shall exist and does exist. Thus if the defendants should assert, as they have hitherto done, that judicial decisions do not make law, then the decisions we have heretofore cited on this question in this brief, are a declaration and application of the law as found by the courts to exist, and is declared by

the statute shall exist, on the question of the property rights and legal relationship of the colocators and co-owners of a mining claim inter se.

It may be well at this point to collate the facts as disclosed by the record in this action which show that the relation of tenants in common exists and has always existed between George McManus, his heirs and successors in interest and the defendants and their predecessors in interest. The material facts creating a cotenancy disclosed by the bill of complaint are as follows: George McManus, under the name of George McManes, Perry Doan, Wm. F. Ford, G. B. Hall, M. Iba, H. T. Snively, Martin Ashcraft, and Sam Bedsaul on January 11, 1887, entered upon, located, staked, and made a valid discovery of valuable deposits of petroleum oil in certain and substantial quantities in and upon the Southeast Quarter of Section 13, T. 40 North, R. 79 West, named it the O'Glase oil placer mining claim, and duly posted the discovery notice, and filed the location certificate, required by law. (R. 2-3.) These acts vested in George McManus and his seven colocators a possessory estate and title that is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent, and that valid mining location made the locators thereof and their successors in interest tenants in common under the law. This estate was maintained by George McManus and his colocators and co-owners by the doing of the annual assessment work upon the O'Glase oil placer mining claim by performing or causing to be performed thereon not less than one hundred dollars' worth of labor, or improvements made, during each year since the year 1887, down to and including the year 1920. (R. 4-5.) The title and estate of George McManus and his heirs and successors in interest in the O'Glase claim have never been forfeited and have never been abandoned. (R. 6.) nor has the estate and interest of George McManus and his heirs ever been divested by conveyance or operation of law. (R. 7-8.) On March 11, 1884, George McManus, Perry Doan, and

Sam Bedsaul executed and delivered to Cy Iba and Shepherd Fales a joint power of attorney to locate lode and placer mining claims in Carbon County, Wyoming, and to jointly sell and convey as joint agents for their said principals such lode and placer mining claims as might be located by the said Shepherd Fales and Cy Iba as attorneys in fact for their said principals above named. (R. 11-13.) Neither Cy Iba or Shepherd Fales ever located any mining claims for any of the locators of the O'Glase claim, as their attorneys in fact, and the O'Glase claim was not located by Cy Iba and Shepherd Fales, or either of them. (R. 2-3-14-15.) On April 6, 1886, M. Iba, Hall, Snively, Ashcraft and Bedsaul granted such a power of attorney to Cy Iba as the sole constituent. (R. 11.) On December 31, 1888, Hall revoked his power of attorney to Cy Iba. (R. 11.) Wm. F. Ford never granted a power of attorney to Cy Iba. On February 18, 1890, Cy Iba executed, as attorney in fact for the locators, (R. 11.) and pretending to act as attorney in fact for George McManus, but without being joined by Shepherd Fales, (R. 11-15.) a quit claim deed purporting to convey to Victoria A. D. Johnson an undivided one-half interest in the O'Glase claim. (R. pp. 11-15.) This deed to Victoria A. D. Johnson made her a tenant in common with George McManus, as it actually conveyed to her an undivided one-half of the one-eighth interests of the locators Bedsaul, Ashcraft, Snively, and M. Iba, and thus made Victoria A. D. Johnson a tenant in common with George McManus and his heirs. This deed of February 18, 1890, did not and could not convey any of the interests of the locators McManus, Doan, Ford and Hall in the O'Glase claim, as is fully shown by the allegations of the bill of complaint. (R. 11-13-14.) And the defendants have never acquired those interests. On March 16, 1900, the locators Bedsaul and Ashcraft conveyed what interest they had in the claim to Cy Iba. (R. 11.) This conveyance conveyed the two one-sixteenth interests that Bedsaul and Ashcraft had remaining in the claim, (R. 11.) and made Cy Iba a

cotenant in the O'Glase claim with George McManus and Victoria A. D. Johnson. On April 12, 1905, Cy Iba executed in his sole behalf a quit claim deed purporting and pretending to convey to Joseph H. Lobell an undivided one-half interest in the O'Glase claim (R. 11-15.) On and prior to April 12, 1905, Cy Iba actually had no interest in the O'Glase claim other than the interest conveyed by the deed of Bedsaul and Ashcraft on March 16, 1900, which in fact conveyed only an undivided one-eighth interest. (R. 11-15-16.) At the time of that conveyance from Cy Iba to Joseph H. Lobell he was a co-owner and cotenant with McManus and his heirs, and by accepting such conveyance of an undivided interest in the O'Glase claim Joseph H. Lobell became a cotenant with the heirs of George McManus, Victoria A. D. Johnson, and Perry Doan, George B. Hall and Wm. F. Ford, the other colocators and co-owners of said O'Glase claim. On February 16, 1907, Victoria A. D. Johnson conveyed what purported to be an undivided one-half interest in the O'Glase claim to Frederick J. Lobell, who two days later conveyed same to Joseph H. Lobell (R. 11.) This deed from Victoria A. D. Johnson to Frederick J. Lobell made him a cotenant with George McManus and his heirs, and also a tenant in common with Joseph H. Lobell, who had been a cotenant with George McManus and his heirs, and with Victoria A. D. Johnson, since April 12, 1905, and Joseph H. Lobell knew that Victoria A. D. Johnson did not own an undivided one-half interest, but only an undivided fourth, when he took the deed from his brother, Frederick J. Lobell. (R. 11.) The undivided interest in the claim thus acquired by Joseph H. Lobell, passed August 26, 1915, to the applicant the Federal Oil & Development Company (R. 11-16.) and the alleged right and title of the defendant the Federal Oil & Development Company to the title, interest and estate of George McManus in and to the O'Glase claim rests solely upon the said deeds hereinbefore described. (R. 16.) These facts, as disclosed by the allegations of the bill in this

action, show conclusively that George McManus and his heirs were at all times cotenants in the O'Glase placer mining claim with the predecessors in interest of the defendant the Federal Oil & Development Company, and that when the Federal Oil & Development Company acquired the undivided interests of the original locators M. Iba, Snively, Ashcraft, and Bedsaul, by the deed of August 26, 1915, it became and remained a co-owner and tenant in common with the heirs of George McManus, and that cotenancy has never been terminated or destroyed, as is shown by all the remaining allegations of the bill of complaint. (R. 1-22.)

A tenancy in common between the colocators and co-owners of a mining claim is a relation created by law, and not by contract or actual agreement of the parties. The relation of cotenancy exists between the owners of a mining claim whether they acquire their interest therein by location, by deed, or by purchase at an execution sale, or in any other manner, as all the cases cited in this subdivision of the brief clearly show. A tenancy in common may be terminated either by uniting all the interests in the land in one tenant, by purchase, or otherwise, which makes him the owner of the whole in severalty, or by making partition between the several cotenants, which gives them each an interest in severalty in a specific part of the land, or by the ouster and disseisin by one of the cotenants of the others coupled with actual, exclusive, adverse, open, notorious and hostile possession of the premises by the ousting cotenant for the period required by the statute of limitations against the disseised cotenants, and in that instance the occupant must not only be in the actual, exclusive and adverse possession of the land, claiming it as a whole, and that such possession is open and notorious, with a claim to himself in all of it, but these facts must be *known to the ousted cotenant*, in order to eventually ripen the possession of the claimant into title in himself. There is not a single allegation in the bill of complaint that goes to sustain any of these means by which a cotenancy can be terminated.

The averment in the bill of complaint that the defendant the Federal Oil & Development Company, in its application for the lease, alleged that, "The said claim has been claimed and possessed continuously since prior to July 3, 1910, by this claimant and its predecessors in interest, and is now claimed and possessed by it." (R. 8.) is not an allegation of an adverse possession during all that period, such as to constitute a bar under the statute of limitations. Such a bar, therefore, does not exist, and as that is a matter of defense it should appear affirmatively, to be of any avail. That allegation, made by the defendant Federal Oil & Development Company in its application for lease, negatives and destroys any presumption of adverse, actual, exclusive and hostile possession of the mining claim by the defendant the Federal Oil & Development Company and its antecedent grantors.

Union Con. Silver M. Co. v. Taylor, 100 U. S. 37, 40

Victoria A. D. Johnson continued as a co-owner and cotenant with all the original locators, including McManus and his heirs, for seventeen years after the conveyance to her by Cy Iba, as attorney in fact for the locators Bedsaul, Ashcraft, M. Iba and Snively, of an undivided one-half of their undivided one-eighth interests in the claim, which amounted only to an undivided one-fourth interest in the entire O'Glase claim, and her deed to Frederick J. Lobell on February 16, 1907, purporting to convey an undivided one-half interest in the claim actually conveyed only an undivided one-fourth interest, and this deed made Lobell a cotenant with his co-owners in the claim, among them being the heirs of George McManus, and the quit claim deed of Frederick J. Lobell to Joseph H. Lobell, although purporting to convey an undivided one-half interest, actually conveyed no more than Frederick J. Lobell received from his grantor Johnson. The deed of March 16, 1900, from Bedsaul and Ashcraft to Cy Iba, which purported to convey only what

interest they had in the claim to Cy Iba, an undivided two-sixteenths, made him a cotenant with George McManus and the other colocators and co-owners of the claim, and this relation of cotenancy existed between Cy Iba, George McManus and his heirs, Victoria A. D. Johnson, and the other original locators and co-owners of the O'Glase claim for a period of over five years, when Cy Iba conveyed the undivided one-eighth interest he actually owned in the mining claim to Joseph H. Lobell by a deed purporting to convey an undivided one-half interest, and thus Joseph H. Lobell by that deed succeeded to the same interest of Cy Iba in the mining claim, and became a cotenant with the other tenants in common in the claim. There is not a syllable in any of the averments of the bill of complaint, from which can be drawn any presumption of actual, open, exclusive, adverse, notorious, and hostile possession of the premises by any one of these cotenants against the other for any period of time until the granting of the lease to the defendant the Federal Oil & Development Company. (R. 19.) The deed from Joseph H. Lobell to the Federal Oil & Development Company on August 26, 1915, did not convey or purport to convey the entire interest in the O'Glase claim, but it purported to convey only the title thus acquired by Joseph H. Lobell, which was an undivided one-half interest, he never having received a deed conveying the entire title to the mining claim, or purporting to convey the entire title, and that interest thus passed to the defendant the Federal Oil & Development Company, as shown by the allegations of the bill heretofore referred to, was only an undivided four-eighths, or eight-sixteenths, of the O'Glase claim. (R. 12-16.) Further, the defendant the Federal Oil & Development Company never made any claim that it acquired any interest in the O'Glase claim by a prescriptive title under the statute of limitations, until after the commencement of this action, when the defendants have been driven to urge it by the necessities of their case. In order to obtain the oil and gas lease the defendant the Federal Oil & Devel-

opment Company in its application for lease alleged, "That said company purchased said land in the due course of trade, in which they relied upon the record title to the same." (R. 9.) In the Interior Department, in order to obtain the lease, they necessarily alleged the acquirement of title to the O'Glase claim by purchase; after the procurement of the lease, and in order to defeat the enforcement of a trust in it in favor of their cotenants, the defendants in this action urge that they acquired their title *by prescription, and not by purchase.*

THE BILL OF COMPLAINT STATES A CAUSE OF ACTION, ENTITLING THE PLAINTIFF, AS A CO-OWNER AND COTENANT WITH THE LESSEE, TO RECOVER AN UNDIVIDED INTEREST IN THE LEASE, AND THE ACTION OF THE SECRETARY OF THE INTERIOR IN GRANTING AN OIL AND GAS LEASE TO THE DEFENDANT WAS NOT A FINAL ADJUDICATION OF THE RIGHTS OF THE EXCLUDED COTENANT IN THE PREMISES

In this class of cases it is sufficient to allege the facts constituting the cotenancy, the procurement of the paramount title to the common property from the United States by one of the tenants in common to the exclusion of the other, the refusal of the cotenant obtaining the paramount title to the common property to recognize the rights of the excluded cotenant, the willingness of the excluded cotenant to pay his proportionate share of the cost of obtaining such title to the common property, and in all things do equity in the premises. All these facts are alleged in the bill of complaint in this action.

The facts pleaded in the bill, and admitted by the motions to dismiss, show that George McManus, his heirs, and their co-owners, as the owners and holders of a valid and subsisting placer mining claim, at the date of the Executive Order of Withdrawal of September 27, 1909, at the time of the passage of the Minerals Leasing Act of February 25, 1920, 41 Stat. at L. 437, 443, and at the date of the issuance of the oil lease to the defendants on April 1, 1921, were, each and all of them, by virtue of such co-ownership and co-tenancy, in privity with the United States, and were on each of said dates entitled to apply for a patent, or its legal equivalent, an oil lease, for the premises embraced in the O'Glase placer mining claim. It was this privity that en-

abled the applying cotenant, the Federal Oil & Development Company, to apply for and obtain the oil lease as the purported owner of the entire mining claim. This privity of estate between the original locator McManus, his heirs, this plaintiff and the defendants and the United States, still exists, and it is this privity of estate between the plaintiff and defendants and the United States that entitles the plaintiff to the relief sought in this action.

Turner v. Sawyer, 150 U. S. 578

Stevens v. Grand Central M. Co., 133 Fed. 28 (8th CCA)

Rector v. Gibbon, 111 U. S. 276

“A bill in equity must contain a sufficiently certain, though general, statement of the essentially ultimate facts upon which the complainant rests his claim for relief. It is not necessary to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. General certainty is sufficient in pleadings in equity.”

St. Louis v. Knapp, Stout Co., 104 U. S. 658

“The facts constituting a cause of action in equity must be distinctly alleged, so that the defendant may know what he has to meet, and so that he may, if he choose, put them in issue. But the rule must receive a reasonable interpretation, and must be so enforced as to further, and not obstruct, the administration of justice. All pleadings must be construed reasonably, and not with such restrictions as to refuse to adopt the natural construction of the pleading, because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally and reasonably to be presumed from the averments made in the pleadings.”

Lockhart v. Leeds, 195 U. S. 427, 434

The bill of complaint pleads fully the facts constituting a valid mining title to the premises, showing that such title had vested in George McManus and his colocators, and that the interest and title of George McManus has never been divested either by deed or conveyance, or by operation of law, and has never been abandoned, by act, or by deed, or in any manner whatsoever, and that the said title has never been forfeited by the statutory proceedings for forfeiture, or in any other manner whatsoever. (R. 5-6-7-8.) The law under which the right and title of McManus are asserted is also pleaded, and these facts, when read in the light of existing law, show that under the general rules and principles of equity the plaintiff is entitled to be decreed to be the owner of an undivided one-eighth interest in the oil lease granted to the defendant, and is entitled to a conveyance of the title thus held by the defendant as trustee for the plaintiff. The defendant applied for a lease on the entire one hundred and sixty acres comprising the associated oil placer claim located, known and maintained as the O'Glase, and received a lease for the entire acreage. The title to this oil placer mining claim was held in common by the heirs of George McManus and the defendant the Federal Oil & Development Company; that holding made them tenants in common, which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the common property so situated. The granting of an oil lease for a period of twenty years on the defendant's application, does not destroy the allegations of the complaint as to discovery, location and title, as such allegations are admitted to be true by the motion to dismiss on the ground of insufficient facts, and such motion must be decided upon the admitted facts in the record, and not upon inferences drawn from the action of an administrative officer. The defendant having presented a common undivided title, in which it owned, on the computation most favorable to it, that is, by assuming

that the Federal Oil & Development Company had acquired the title of Wm. F. Ford, only an undivided five-eighths, and the plaintiff an undivided one-eighth, to the Land Department, and that title being an association oil placer mining claim which the law declares cannot exceed twenty acres for each colocator, and having received a lease not for five eighths or one hundred acres of the premises, but for the entire acreage included in the mining title, cannot now be heard to say that the action of the Land Department in granting the defendant the Federal Oil & Development Company a lease to the whole instead of a moiety of the claim embraced in the common title extinguishes that title, and precludes a court of equity from inquiring into the facts, and adjudging that the title to an undivided interest in the lease that was never the property of the defendants shall be conveyed to its rightful owner.

In the case of *Turner v. Sawyer*, 150 U. S. 578, this court held that in an action by an excluded cotenant to have conveyed to him an undivided interest in a patented mining claim, from which patent he had been excluded by his faithless cotenant and the Land Department, it was unnecessary to allege fraud in the bill of complaint or to make proof of the same, *as the relation of cotenancy being established, that fact alone entitled the court to decree a conveyance of the undivided interest.* In the statement of facts in that case in the 150 U. S. at page 581, is the following:

"On March 17, 1887, the appellee Sawyer filed this bill, *charging the patent to have been procured by the appellant Turner by false and fraudulent representations as to ownership, and praying that the title to an undivided five-eighths of the lode be deemed to belong to the appellee, and that Turner convey the same to him.*"

Commenting on these facts as shown in that case, this Court, in its opinion in 150 U. S., pages 585 and 586, said:

"It seems, however, that Turner, soon after the making and filing by him of an affidavit of non-payment by Sawyer of his alleged proportion of his claim for labor, instituted

proceedings in the land office at Central City for the purpose of procuring a patent for this lode to be issued to himself alone, and prosecuted such proceedings so far as to obtain on April 13, 1886, a receiver's receipt so called, issued from the land office and delivered to him. This receipt was recorded in the recorder's office of Clear Creek County, Colorado, and on April 20, Turner conveyed to appellants Allison and McClelland each an undivided one quarter interest in the lode. *Whether he procured such receiver's receipt by fraudulent and false representations, as charged in the bill, it is unnecessary to determine. It is clear, to put upon it the construction most favorable to him that he acted under a misapprehension of his legal rights.* There is nothing in the record showing that he ever became possessed of Sawyer's interest in the lode. Assuming that, under the proceedings in the Teal suit, he had acquired the legal title to Sanderson's interest, *he became merely a tenant in common with Sawyer and his subsequent acquisition of the legal title from the land office enured to the benefit of his cotenants as well as himself.* It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will enure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his cotenants, to acquire a title to which he must have known, if he had made a careful examination of the facts, he had no shadow of right."

Turner v. Sawyer, 150 U. S. 588.

The case of Stevens v. Grand Central Min. Co., 133 Fed. 28, a case decided by the Eighth Circuit Court of Appeals

in 1904, was a suit in equity to enforce a trust in favor of the appellants in a mining claim patented by the United States to Henry Kohl and Charles H. Blanchard, two of the appellees. The case made by the material allegations of the amended bill is substantially as follows:

"Subject to the paramount title of the United States, one Timothy Kelly and the defendant Kohl were the joint and equal owners, entitled to the possession and in actual possession, of four mining claims in the Tintic mining district, Juab County, Utah. May 23, 1889, while this situation continued, the defendants, Kohl and Blanchard, for their own benefit, and for the purpose of excluding Kelly from any interest in these claims, amended the location notice of one of them, and restaked it upon the ground in such manner as to embrace therein portions of each of the four claims. They then caused the amended claim to be surveyed, made application October 1, 1889, at the United States Land Office, for the issuance to them of a patent therefor, and obtained a patent January 9, 1892. They fraudulently concealed the amended location survey, and application for patent from Timothy Kelly until about January 23, 1891, when he evidently learned of these proceedings, although it is not expressly so stated, and, with others not named, commenced a suit in one of the territorial courts of Utah against Kohl and Blanchard to establish his interest in the amended claim. February 27, 1893, during the pendency of that suit, Timothy Kelly died. Thereafter, without his estate being in any manner represented, a dismissal of the suit was procured by Kohl and Blanchard, without a trial or determination of its merits. July 12, 1895, Daniel Kelly became administrator of the estate of Timothy Kelly, and in 1901 the estate was finally settled, and the administrator was discharged. October 1, 1899, the administrator, with others, commenced a suit in the district court of Juab county against the present defendants to recover the interest in the property held by Timothy Kelly in his lifetime, and to recover for ores extracted therefrom; but the suit

was dismissed, without prejudice to a new one, about June 30, 1900. Up to the time of his death Timothy Kelly remained in the actual possession of said claims, working and developing the same, and doing upon each the annual work required by the laws of the United States and the rules and regulations of the mining district. Daniel Kelly, immediately after his appointment as administrator, went into possession of the claims on behalf of the estate of Timothy Kelly, and continued in such possession, working and developing the claims, until November 1, 1900, when the interest owned by Timothy Kelly in his lifetime was conveyed to the complainants, who are now the owners thereof, and of all rights of action for ores extracted therefrom. The mining company acquired an interest in the patented claim from Kohl and Blanchard, with full knowledge of the rights of the complainants and their predecessors in interest; and, since the issuance of the patent, large quantities of valuable ores have been extracted from the claim by the defendants, for which they refuse to account. The complainants offer to pay their proportionate share of the moneys expended in procuring the patent, and pray that the defendants be declared trustees for the complainants in respect of the title to an undivided one-half of the patented claim, and be required to convey the same to the complainants, and to pay them for their share of the ores extracted."

"The defendants severally demurred to the amended bill, assigning as cause that the bill made no case for equitable relief, and that the suit was barred by the statute of limitations of the state and by inexcusable laches. The demurrers were sustained, and this appeal is prosecuted from a decree dismissing the bill."

Van Devanter, Circuit Judge, after stating the case as above, delivered the opinion of the court, as follows:

"The general rule that co-tenants stand in a relation to one another of mutual trust and confidence, that one will not be permitted to act in hostility to the others in respect of the joint estate, and that a distinct title acquired by one

will inure to the benefit of all applies with full force to the joint owners of a mining claim. A co-owner who amends the location notice, relocates the claim, or procures the issuance of a patent in his name, will not be permitted to thus exclude the other owners and appropriate the claim for himself, but will be declared to hold the right or title thereby acquired in trust for all. Nor will the trust be avoided or its enforcement be defeated merely because a stranger to the original claim participates with the unfaithful co-owner in the proceedings to wrongfully exclude his companions in interest, and jointly with him acquires the title to which they are entitled. * * * The purpose of the present suit is not to defeat the amended claim, or to establish a superior right under an independent and conflicting location, but to establish and enforce a trust in the amended claim arising out of the circumstances surrounding its origin and the proceedings by which it was carried to patent."

Stevens v. Grand Central Min. Co., 133 Fed. 28, 31.

Rector v. Gibbon, 111 U. S. 276, is a very instructive case in this connection. That was a bill filed by appellant to enforce a resulting trust, claimed by him in certain lands within the Hot Springs Reservation, which had been awarded to the appellee by the Hot Springs Commissioners under the Act of March 3, 1877, 19 Stat. at L. 377. This was an act passed to relieve settlers upon the Hot Springs Reservation. It provided for the appointment by the president of three discreet, competent and disinterested persons to constitute a Board of Commissioners and imposed upon them various duties. The Act, among other things, declared that claimants and occupants should file their claims before the Commissioners *within six months after the first session of the Board or that their claims should be barred*, and that no claim should be considered which had accrued after the 24th of April, 1876. The wording of this Act seems to show that it was the precedent upon which the Oil Leasing Act of February 25, 1920, was framed. It differs from the pro-

visions of Section 18 of the Oil Leasing Act in the fact that the Act specifically declared that all claims not presented to the commissioners within six months after the first session of the board should be barred, a provision that is not contained in Section 18, or any other section of the Oil Leasing Act. Nevertheless, it was held in a contest between two parties claiming a tract of land under the same title that the decision of the Commissioners on that subject was not final, and that the specific limitation contained in the Act that claims not presented within six months should be barred, did not divest a court of equity of jurisdiction to review the decision of the Commissioners where it was alleged that their decision had been made under a mistake of law. And it was held that the finality of the decision of the Commissioners declared in the Act, and that claims not presented within six months should be barred, had reference only to the supervisory action of the Commissioners; that after the title had passed from the Government and the question had become one of private right, the jurisdiction of courts of equity might be invoked to ascertain if the patentees did not hold in trust for other parties; and if it appeared that the party claiming the equity had established his right to the land upon a true construction of the Act of Congress and by an erroneous construction the patent had been issued to another, the court would correct the mistake. The court further held that everything in the statute from the beginning to the end, indicated an intent that in awarding the right of pre-emption the Commissioners should be governed not by an arbitrary discretion but by the existence of claims by possession and a consideration of the mutual rights of parties as between one another, and that they had no right to disregard the very principles upon which the statute was founded.

Rector v. Gibbon, 111 U. S. 276

In the case of Rector v. Gibbon, *supra*, the same contention was made that the determination of the Hot Springs

Commissioners as to the right of each claimant and occupant to purchase the land, or a portion of it, was final, and not reviewable by the courts, as is made by the defendants in the instant case, and in answering and overruling that contention, this Court, speaking through Mr. Justice Field, said:

“The provision of the Act that the commissioners shall finally determine the right of each claimant or occupant to purchase the land or a portion of it, does not necessarily withdraw that determination from the consideration of the court. It is final so far as the land department is concerned. By the general law, all proceedings for the alienation of the public lands, from the incipient steps to a patent, are placed under the supervision of that department. The provision in question takes the action of the board, in the particulars mentioned, from that supervision. In effect it substitutes the board in the place of the ordinary land officers, with only a modification of duties and powers adapted to the peculiar circumstances of the case. It does not withdraw its decisions from the correcting power of the court, when the board has misconstrued the statute and thus defeated its manifest purpose and made its benefits inure to those who were never in the contemplation of Congress, and therefore were not intended to be the recipients of its bounty.

“The powers of the commissioners under the Act of 1877 are not essentially different from those of the receiver and register of the land office in cases of conflicting claims to pre-emption. The latter officers must hear the evidence of parties, and decide as to which has the better right to the patent certificate. The judicial character of their investigation and determination is as great and important as that of the commissioners under the Act of 1877. The acts done in both cases relate merely to the sale of public lands; and it is difficult to perceive any reason why, when private rights are invaded, the door should be closed against relief

in the courts of the country in the one case more than in the other.

“The case as shown by the bill is one of a clear disregard by the commissioners of their authority. The statute in terms declares that they shall not consider any claims accruing after April 24, 1876. They have not heeded this injunction, but awarded the right of purchase to parties whose only claim originated in 1877. It would require, under these circumstances, very clear language to deprive the injured party of relief. Again; the statute, in requiring them to finally determine the right of each claimant or occupant to purchase parts of the reservation, recognizes the existence of rights as between different claimants, though equally without title so far as the government is concerned. But in their decision they have ignored the universally acknowledged right as between landlord and tenants, giving to the latter what could by no possibility belong to them in the relation which they occupied. Had Congress intended to invest the commissioners with absolute discretion in awarding the privilege of preemption of the several parcels of land, its language would have been different; it would not have required an examination of witnesses, a regard for existing boundaries and a determination of rights. Everything in the statute, from the beginning to the end, indicates an intent that, in awarding the right of preemption, the commissioners should be governed, not by an arbitrary discretion, but by the existence of claims by possession and a consideration of the mutual rights of parties as between one another. They had no right to disregard the very principle on which their appointment was based.

“On matters depending upon conflicting evidence as to the extent of occupation and the value of improvements, and many other matters, the action of the commissioners is undoubtedly final; but upon the construction of the law, and particularly as to the parties for whose benefit it is designed, it is subject equally with all local boards of lim-

ited jurisdiction to have its conclusions, if erroneous, reviewed and corrected by the judicial tribunals. This question was very fully and thoughtfully considered in *Johnson v. Towsley*, 13 Wall. 72. In that case the direct question was as to the effect to be given to the 10th section of the Act of June 12, 1858, which declared that appeals in cases of contest between different settlers for the right of preemption should thereafter be decided by the Commissioner of the General Land Office, whose decision shall be final unless appeal therefrom be taken to the Secretary of the Interior. It was held that the finality there declared had reference only to the supervisory action of the land department; that, after the title had passed from the government and the question had become one of private right, the jurisdiction of courts of equity might be invoked to ascertain if the patentees did not hold in trust for other parties; and if it appeared that the party claiming the equity had established his right to the land upon a true construction of the Acts of Congress and by an erroneous construction the patent had been issued to another, the court would correct the mistake. In the opinion Mr. Justice Miller, speaking for the court, referred to the general doctrine that when a special tribunal has authority to hear and determine certain matters arising in the course of its duties, its decision within the scope of its authority is conclusive upon all others, and said:

“That the action of the land office in issuing a patent for any of the public lands, subject to sale by preemption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong,

in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the Crown, or other executive branch of the government have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing and mistakes. These are among the most ancient and well established grounds of the special jurisdiction of courts of equity referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office.

“This case is a leading one in this branch of the law and has been uniformly followed. The decision aptly expresses the settled doctrine of this court with reference to the action of officers of the land department, that when the legal title has passed from the United States to one party, when in equity, and in good conscience, and by the laws of Congress, it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title. This doctrine extends to the action of all officers having charge of proceedings for the alienation of any portion of the public domain. The parties actually entitled under the law cannot, because of its misconstruction by those officers, be deprived of their rights.”

Rector v. Gibbon, 111 U. S. 288, 291
 Johnson v. Towsley, 13 Wall. 72
 Swor v. Morris, 227 U. S. 523

The defendants lay great stress upon the dissenting opinion of Chief Justice Waite, concurred in by Justices Harlan, Woods, and Blatchford, in the case of *Rector v. Gibbon*, supra, so we quote it in full:

“Mr. Chief Justice Waite, dissenting: I am unable to agree to this judgment. In my opinion the Act of March 3, 1877, granted a new right to the occupants of the Hot Springs Reservation and provided a special tribunal for the settlement of all controversies between conflicting claimants. The right and the remedy were created by the same statute and, consequently, the remedy thus specially provided was exclusive of all others. No provision was made for a review of the decisions of the tribunal. Its determination, therefore, of all questions arising under the jurisdiction must necessarily be conclusive, and not open to attack collaterally. It seems to me there is a very broad distinction between this case and that of *Johnson v. Towsley*, 13 Wall., 72, and others of that class. Here a special tribunal has been created for a special purpose. It has been clothed with power to compel the attendance of witnesses and to finally determine the right of each claimant or occupant to purchase from the United States, under the provisions of the Act of Congress, the ground he occupies or claims. The duties of the tribunal are judicial in their character and their decisions evidently intended to be binding on the parties. The question now is not whether, if Rector had kept away from the tribunal and Gibbon had got a title under his occupancy, he could be charged as trustee for Rector on account of his tenancy, but whether, having appeared before the tribunal and been beaten in a contest with Gibbon, on that identical question, Rector can in this suit correct the errors of the tribunal in its decision. I think he cannot. If he can it is difficult to see why all the decisions of the tribunal are not open to revision by the courts. I am authorized to say that Justices Harlan, Woods, and Blatchford concur with me in this opinion.”

That dissenting opinion also destroys the defendants' contention in the instant case, that because the heirs of George McManus did not appear and apply in person for an oil lease, the action of the Secretary of the Interior in awarding the lease to the defendant is a final adjudication not reviewable by the courts.

The proposition that the action of the Secretary of the Interior, in issuing a patent for a mining claim, is final and conclusive as to the parties to whom the title shall inure, was considered by the Supreme Court of Montana in *Delmos v. Long*, 35 Montana, 139, and the Court in that case held that the title of the co-owners of a mining claim inter se could be inquired into in an action to impress a trust upon an undivided interest in the patented claim, the Court saying:

"Just here we notice the contention of the parties as to the effect of the forfeiture proceedings by Horst and the issuance of patent to Horst exclusively, in pursuance thereof. It is argued by appellants that the proceedings in the land office became final and conclusive upon the respondent, and that the court could not inquire into the question whether the work had actually been done by Horst in 1892. The respondent assumes the position that the whole matter was still open for investigation, and that the forfeiture proceedings could be of no avail to shut out the respondent if the work had not, in fact, been done; for since, though the work was necessary after application had been made, no forfeiture would become effective in favor of a third person who did not comply with the law touching the relocation of the claim, it could not for the same reason become effective in favor of a co-owner who had not in fact done the work, no matter what notice may have been given. With this view we agree. We do not see how *ex parte* proceedings by a co-owner under the statute, if the work had not actually been done, could have any more force or effect than a forged deed. If, instead of falsely representing to the Land Department that the plaintiff had forfeited his

interest, Horst had forged a deed in the name of the plaintiff and presented it to the department, the patent would have issued. Nevertheless, no one would contend that under these circumstances the plaintiff could not successfully avoid the deed, have it set aside, and thus recover his interest. The statute upon which the defendants rely is one of forfeitures. It must be strictly construed. *Brundy v. Mayfield et al.*, 15 Mont. 201; *Turner v. Sawyer*, 150 U. S. 585. In *Brundy v. Mayfield et al.*, *supra*, the plaintiff sought to have the defendants declared trustees for his benefit of an interest in a certain mining claim. The defendants had obtained the patent to the exclusion of the plaintiff, who owned an interest therein, by representing to the Land Department that the plaintiff had not contributed his share of the representation work during certain years and prior to the application for patent, and that they had published the notice provided by the statute. The district court found that the representations were false, and that the plaintiff had, in fact, contributed his share of the necessary expenditures. The court in affirming the judgment held that, since the ground of forfeiture did not in fact exist, the mere publication of the notice did not conclude the plaintiff. The court in this case found that the work had not in fact been done by anybody for the year 1892, and hence that the publication of notice was not effective for any purpose. If any authorities were needed, we deem the case of *Brundy v. Mayfield, et al.*, *supra*, conclusive."

Delmoe v. Long, 35 Montana, 139

Iron Silver Min. Co. v. Campbell, 135 U. S. 286

Van Sice v. Ibex Min. Co., 173 Fed. 895 (8th CCA)

Franklin Min. Co. v. O'Brien, 22 Colo. 129

An owner who has been excluded by his co-owner from an application for patent, may maintain an action against the patentee to establish and enforce a trust in the patented claim.

Suessenbach v. Bank, 5 Dak. 466
Clark v. Mitchell, 35 Nevada 447-464
Davidson v. Fraser, 36 Colo. 1
Allen v. Blanche G. M. Co., 46 Colo. 199
Hallack v. Traber, 23 Colorado 14
Malaby v. Rice, 15 Colo. App. 364

One co-owner cannot obtain title to the claim as against his co-owner by relocating the claim on the ground that the required annual assessment work had not been done.

Speed v. McCarthy, 181 U. S. 269

It should be remembered that this suit is not an attack upon an oil and gas lease; it is not a suit to set aside an oil lease and obtain another lease. It is not a suit brought by an adverse claimant, who claims under an independent and hostile title, to have the entire premises and title conveyed to him, such as is involved in a controversy between rival claimants under the preemption and homestead laws, townsite, stone and timber, and desert land acts, and other non-mineral land laws, or between rival claimants for leases for Indian lands from an Indian allottee who is a ward of the United States, where each of the parties seek to acquire the same tract of land under different, distinct and adverse settlements, filings, entries, and contracts, in which the claim of title of each party is hostile to the other from its inception. It is not a suit to establish a superior right under an adverse, independent and conflicting mining location; and this is not a suit to defeat the claim of the defendants under the O'Glase oil placer mining location. The purpose of this suit is to enforce a trust in the lease granted by the United States to the premises included within the O'Glase oil placer location, the right to receive said lease having its inception in and being derived from that association oil placer mining location made by George McManus and his seven colocators, which location was the effective medium by which the legal title to the land embraced within that location was procured by means of an oil lease from the United States, whereby the defendants have be-

come possessed of property which the United States intended to confer upon all the rightful owners of the oil placer claim, and not solely upon the owner of a moiety thereof. The trust, arising out of the circumstances surrounding the origin of the O'Glase oil placer claim, and the proceedings by which an oil lease was obtained under that location, is sought to be enforced only to the extent of an undivided one-eighth net interest in the lease granted for the one hundred and sixty acres comprising the association oil placer mining claim, which the allegations of the bill of complaint, admitted by the motions to dismiss, show rightfully belongs to the plaintiff. It is an axiom of the mining law of the United States that a patent for a mining claim issued by the Government has its inception in and relates back to the location of the claim for which it is issued, that the patent is simply evidence of the title conferred by the location. Exactly the same principle is applicable to an oil lease issued under the Minerals Leasing Act of February 25, 1920. By the provisions of Sections 18 and 19 of that Act the applicant for an oil and gas lease must found his application for such lease upon a mining location under the pre-existing placer mining law, and must in fact and in law be possessed of all the right, title, interest and claim of the locators in and to such oil placer mining claim, in order to rightfully entitle such applicant to an oil and gas lease on such oil lands that have heretofore been located, worked and held under the pre-existing mining laws of the United States prior to the passage of the Oil Leasing Act. The oil and gas lease under which the defendants' claim had its inception in, and is inseparably and indissolubly connected by the doctrine of relation with, the discovery and location of the O'Glase oil placer mining claim, on January 11, 1887, made by George McManus and his seven colocators, covering the Southeast Quarter of Section 13, Township 40 North, Range 79 West, the identical premises that are included and conveyed in the lease to the defendants; a cotenant, who is seized per mi et per tout,

may treat the common property as his own against everyone, except his cotenants, in prosecuting an action for the recovery thereof. But the legal result of such action, such as the recovery of a judgment, or the obtaining of the common title, inures to the benefit of all his cotenants, whose rights may be enforced in an equitable proceeding by the excluded cotenants.

Hodge v. Palms, 68 Fed. 61, 14 C. C. A. 221
 Rothwell v. DeWeese, 67 U. S. 2 Black 613
 Van Horne v. Fonda, 5 Johns Ch. 338
 Johnson v. Towsley, 13 Wall. 72
 Moore v. Robbins, 96 U. S. 530
 Silver v. Ladd, 7 Wall. 219
 Lindsay v. Hawes, 2 Black 522
 Widdecombe v. Childers, 124 U. S. 400
 Cornelius v. Kessell, 128 U. S. 546
 Sanford v. Sanford, 139 U. S. 642
 Monroe Cattle Co. v. Becker, 147 U. S. 47
 Hedrick v. A. T. & S. F. R. Co., 167 U. S. 673

The Act of February 25, 1920, was passed for the benefit of the original locators of oil placer mining claims, and not for the benefit of a part, but for the *benefit of all* of the locators of such claims. Parties succeeding by conveyance or operation of law to an undivided interest of any such colocators, could not divest the vested title of other colocators and co-owners by an application for and the receipt of an oil lease to the entire mining claim from the United States. Neither could the United States deprive any co-owner and cotenant in such property of his equitable rights in the premises by issuing such oil lease. The cases heretofore cited in this brief show indisputably that the colocators and co-owners of a claim are cotenants or tenants in common of that property in every sense of the word. The possession of one cotenant is, in law, the possession of all his cotenants. The defendants the Federal Oil & Development Company, and those from whom it derived its title, could claim nothing against the heirs of George McManus by virtue either of its possession, for it was in law their pos-

session as its co-owners, or of its improvements, for they were in law their improvements, and entitled them to all the benefits they conferred, whether by patent under the pre-existing mining law, or by an oil lease under the amendment to such mining laws, known as the Minerals Leasing Act of February 25, 1920. No claim against the title of McManus and his successors in interest has ever been asserted by any of the cotenants and co-owners of this mining claim, including the defendants in this action, prior to the issuance of the oil and gas lease to the Federal Oil & Development Company on April 1, 1921, but since the last mentioned date the defendants have been in the actual possession of said premises, and have refused to recognize the rights of the heirs of George McManus and their title to an undivided one-eighth interest therein. (R. 19.) In the fact that an application was made for a patent to the O'Glase claim by the defendant the Federal Oil & Development Company on May 15, 1918, there was nothing to indicate to the heirs of George McManus that the intention was to acquire a title adverse to them.

Nowell v. McBride, 162 Fed. 432, 441 (9th CCA)
Ballard v. Golob, 34 Colorado 417

Adverse proceedings on this application for patent were ordered by the Interior Department on December 8, 1919, but the application for patent was later withdrawn and the case closed on March 25, 1920. (R. 10-11.)

This phase of the case was also considered by Circuit Judge Stone, in his dissenting opinion in the Court of Appeals (R. 60-61,) and disposed of in the following language:

"It is next contended that the award of the government lease under the Oil Leasing Act was an adjudication in rem, binding upon the courts. I cannot accept this contention. It may be conceded that the department is given authority to determine questions of fact as to who comes within the various terms and classifications of the act, but the department is not permitted to mistake the law which it is authorized to apply. It is always allowable for a dissatisfied

party to have the proper court examine the action of a department to ascertain whether the interpretation and application of the law by it has been correct. Appellant challenges this action of the department in that respect, alleging that upon the facts before the department and upon which it acted and which he does not challenge, it misapplied the law. This he is entitled to have examined."

Hodgson v. Fed. Oil & Dev. Co., 5 F. (2d) 444
Swor v. Morris, 227 U. S. 523

George McManus and his colocators were the original discoverers and locators of this mining claim, and of the oil field in which it is situated. For a great number of years they maintained it, despite the summer heat and winter blizzards of the Wyoming desert, by doing the annual assessment work thereon as required by the laws under which it was located. The colocators and co-owners with McManus of this mining claim have never attempted, as this record shows, to divest him of his title and interest therein. The title of George McManus has never been divested by conveyance, by forfeiture, by abandonment, or by operation of law. The following language of Mr. Justice Field, in the case of *Rector v. Gibbon*, 111 U. S. 284, 285, is very apropos to the case at bar:

"Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon; and not those who by violence or fraud or breaches of contract intruded upon the possession of original settlers and endeavored to appropriate the benefit of their labors. There has been in this respect in the whole legislation of the country a consistent observance of the rules of natural right and justice. There was a time, in the early periods of the country, when a party who settled in advance of the public surveys was regarded as a trespasser, to be summarily and roughly ejected. But all this has been changed within the last half century. With the acquisition of new territory, new fields of enterprise

have been opened, population has spread over the public lands, villages and towns have sprung up on them; and all the industries and institutions of a civilized and prosperous people have been established, with the church and school house by their side, before the surveyor with his quadrant and line appeared. With absolute confidence, these pioneers have relied upon the justice of their government, and they have never been disappointed. The most striking illustrations of this confidence, and of the just action of the government are found in the settlement of Oregon and California. Before any laws of the United States had been extended to Oregon, enterprising men crossed the plains and took possession of its fertile fields. They organized a provisional government embracing guaranties of all private rights. They passed laws under which persons and property were protected and justice administered with as much care and wisdom as in old communities. They prescribed regulations for the possession and occupation of land among themselves and, when the laws of the United States were extended over the country, those regulations were respected and the rights acquired under them recognized and enforced."

"So in California the discovery of the precious metals was followed, as is well known, by a large immigration to the state, which increased her population in a few years to several hundred thousand. The majority of the immigrants at first found their way into the mineral regions and became seekers of gold. But still a very large number settled upon the farming lands, erected houses thereon, planted vineyards and orchards, and subjected portions to cultivation. Much of this was in advance of the public surveys and even before the passage of an Act of Congress opening the agricultural lands to settlement, and providing for the sale of the mineral lands. Yet the progress of the country was not thereby stayed. The first appropriator of mineral lands within certain limits, or the first settler on agricultural lands to the extent prescribed by the preemption laws in

force in other States, was recognized everywhere as having a better right than others to the claim appropriated, or to the land settled upon. In all controversies, except as against the government, he was regarded as the original owner from whom title was to be traced. And when the government extended its surveys over the agricultural lands it gave the privilege of purchasing the preemption right, to the first settler, requiring only that his possession should be continued, accompanied with improvement. And when it allowed the mineral lands to be sold, it was to the original appropriator or to those deriving their claim from him that title was given. In no instance in the legislation of the country have the claims of an intruder upon the prior possession of others, or in disregard of their rights, been sustained. Laborers occupying mining claims, or agricultural lands whilst working for the first appropriator or settler, acquired no preemptive rights over him to such claims or lands; nor did any permissive occupation under him, as tenant or otherwise, impair his rights. To construe the Act of 1877 so as to give to lessees a better right than their landlord to purchase the land of which he had been in occupation more than a third of a century, would require us to attribute to Congress not only the intention to do him flagrant injustice, but to depart from its previous uniform and long settled policy to protect the pioneer and original settler upon the public domain."

Rector v. Gibbon, 111 U. S. 284, 286

The defendants in support of their contention made in the court below that the action of the Secretary of the Interior in issuing the oil lease in question to the defendant the Federal Oil & Development Company is final and not reviewable by the courts, cited the following cases:

Bohall v. Dilla, 114 U. S. 47
Lee v. Johnson, 116 U. S. 48
Fisher v. Rule, 248 U. S. 314
Shepley v. Cowan, 91 U. S. 330
Ross v. Day, 232 U. S. 110

Downs v. Hubbard, 123 U. S. 189

Cameron v. United States, 252 U. S. 450

Bohall v. Dilla, 114 U. S. 47 was a controversy between two rival preemption claimants, each claiming the land in controversy under different settlements and different preemption filings. In that case Bohall's claim was invalid from its inception; he never had any privity of estate with the United States, as he had never complied with the requirements of the law under which he claimed the right of preemption. It is to this class of cases, and to this state of facts, that Mr. Justice Field, speaking for this Court, used the following language, in announcing the principles properly applicable to that case and similar cases, as follows:

"We do not think the claim of the defendant to the equitable relief he seeks can be sustained on the grounds stated in his answer or cross-complaint. To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that, in consequence of erroneous rulings of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusions of those officers as to the position of the patentee. It is plain that the defendant, Bohall, did not bring himself within the provisions of the preemption laws. Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon. This implies a residence both continuous and personal. No such continuous residence was shown on the part of Bohall."

It is thus apparent from the opinion of this Court that in the case of *Bohall v. Dilla* the defendant *Bohall* was never entitled to make final proof, or cash entry, and receive a receiver's final receipt for the land he claimed, and was therefore never in privity of title or estate with the Government of the United States, and certainly not in privity of estate with his adversary *Dilla*, who had fully complied with the law and received a patent. The difference between the case at bar and the case of *Bohall v. Dilla*, *supra*, in principle is, that between two claimants under different settlements and entries under the preemption and homestead laws, there is and can be no privity of estate, no cotenancy, their claims are hostile and adverse from their inception, and no act done by one adverse claimant under the homestead or preemption laws can inure to the benefit of the other adverse claimant under those laws. One, and only one, of such claimants can make himself in privity of estate with the Government, and when one claim is established the other necessarily falls, as the claimant who brings himself in privity with the United States under those laws necessarily establishes that his claim is adverse in fact and superior under the law to that of his adversary. It is evident that there could not be any tenancy in common or cotenancy, or any fiduciary relation, or any relation of trust and confidence in law, between such adverse claimants to the same tract of land, claiming under different and hostile titles, and that the principles applicable to such cases as *Bohall v. Dilla* cannot properly be applied to the facts, or constitute a rule of decision, in the case at bar.

Lee v. Johnson, 115 U. S. 508, was a case involving a contest between two adversary claimants under the homestead laws. In that case *Johnson* had made a homestead filing upon the land in controversy, but had never established a legal residence thereon, and finally abandoned it for more than six months. Thereupon *Lee* initiated a contest against *Johnson* for the right to the land on that ground, and that contest was decided by the Secretary of the Interior in

favor of Lee on the ground that Johnson had never established a legal residence and settlement on the land, and the Johnson entry was ordered cancelled. When the land was thus subject to a new entry Lee entered it under the homestead laws, and subsequently, availing himself of the privilege of commutation under the statute, paid the Government price and obtained a patent therefor. Lee and Johnson were thus asserting adverse rights under totally separate, distinct and hostile titles under the homestead law, and there could be no relation of cotenancy or tenants in common, or any fiduciary relation, or any relation of trust and confidence whatsoever, existing between them, such as exists under the law between the plaintiff and defendants in the instant case. Johnson not having complied with the homestead law, and never having established himself in privity of estate with the United States, and having no privity of estate with his adversary, was within the rule laid down in *Bohall v. Dilla*, *supra*, quoted above, and as laid down by this Court in *Lee v. Johnson*, as follows:

"It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which, otherwise, would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains, he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought; not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. *Bohall v. Dilla*, 114 U. S. 47; *Sparks v. Pierce*, 115 U. S. 408."

Lee v. Johnson, 116 U. S. 50

The limitation of the rule laid down in *Bohall v. Dilla*, *Lee v. Johnson*, and similar cases, was well stated by this Court, speaking through Mr. Justice McKenna, in the case

of Duluth & Iron Range Railroad Co. v. Roy, 173 U. S. 587-590, which was a controversy between a homesteader who had established a legal residence and settlement upon the land in controversy and made sufficient improvements thereon to entitle him to enter it and receive a patent therefor, and the Railroad Company who claimed under a subsequent patent from the State of Minnesota under the Swamp Land Act, this Court saying:

“It is now too well established to need argument to support or a citation of authorities, that when a patent is obtained from the United States by fraud, mistake, or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will divest or control the title thereby acquired, either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. And in two late cases (*Germania Iron Co. v. United States*, 165 U. S. 379; *Williams v. United States*, 138 U. S. 514), it was decided that this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

“The plaintiff in error, however, contends that defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove to it, or established, or alleged even in this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

“This contention is attempted to be supported by the principles announced in *Bohall v. Dilla*, 114 U. S. 47; *Sparks v. Pierce*, 115 U. S. 408; *Lee v. Johnson*, 116 U. S. 48. The principles are that to enable one to attack a patent from the government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He

must show that by the law properly administered the title should have been awarded to him.

“We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness, may not have reached it, and yet justify relief, as in *Ard v. Brandon*, 156 U. S. 537, and in *Morrison v. Stalnaker*, 104 U. S. 213.”

Duluth & Iron Range R. Co. v. Roy, 173 U. S. 590

In that case the obstruction placed in the way of the defendant in error Roy to establish his privity with the United States was the refusal of the local land officers to allow his application to enter the land under the homestead laws, and the rejection by them of his offer of entry on the ground that the land had inured to the State under the act of March 12, 1860, and that his application to enter the lands had not been made within three months after the filing of the township plat in the Land Office and the issuing of a patent to the land by the State of Minnesota under the Swamp Land Act above referred to, whereby the jurisdiction of the Land Office in the premises had ceased. The obstruction placed in the way of the heirs of George McManus and this plaintiff and which prevents them from applying for and obtaining either a mining patent for the land or its present equivalent, an oil and gas lease, is the fact that upon the application of their cotenant the defendant the Federal Oil & Development Company for an oil and gas lease, from which application they were excluded by their applying cotenant, the Land Department has issued an oil and gas lease to their faithless cotenant, and the jurisdiction of the Land Department over the mining claim in controversy has thus ceased, and the rights of the colocators and co-owners of that mining claim inter se have become a matter of private right that can only be determined in

an equitable proceeding in a court of competent jurisdiction, as this Court decided in the Roy case.

Fisher v. Rule, 248 U. S. 314, was a suit brought to charge the grantee from the United States under a homestead patent, as a trustee for one who had made a homestead application for the same premises that was never allowed, and could not have been allowed, as the homestead application of Fisher as originally presented did not show that he was a qualified applicant, and his additional showing came after a suspending order issued by the Secretary of the Interior had superseded the cancellation of the Rule entry and become an obstacle to the initiation of any adverse claim. The following quotation from the opinion of this Court in that case, speaking through Mr. Justice Van Devanter, sufficiently shows that it is a case wholly inapplicable as an authority or rule of decision in the case at bar.

"In no admissible view of these facts can this suit be sustained. Even if, under a right construction of the Homestead Law, Rule was not entitled to the patent,—which we do not at all intimate,—Fisher is not in a position to take advantage of the error. He cannot be heard to complain on behalf of the United States, *and he has no such personal interest in the land as entitles him to complain on his own account. He acquired no right by his homestead application.* It never was allowed, nor could it reasonably have been allowed. As originally presented it did not sufficiently show that he was a qualified applicant, and his additional showing—whatever else might be thought of it—came after the suspending order had superseded the cancellation of the Rule entry and become an obstacle to the initiation of any adverse claim. Neither did he acquire any right by his attempted settlement after that order was made. The order was no less effective against that mode of initiating a claim than against the other. Its purpose was to preserve the status quo pending final action on the Rule entry. A settlement in opposition to such order is

nothing short of a trespass, and confers no right under the Public Land Laws. *Lyle v. Patterson*, 228 U. S. 211, 216, 57 L. ed. 804, 807, 33 Sup. Ct. Rep. 480."

Fisher v. Rule, 248 U. S. 317, 318

Silver v. Ladd, 7 Wall. 219, was a case arising under the Act of Congress of September 27, 1850, commonly called the Donation Law (9 U. S. Stat. 496), and the sole question involved was a mistake of law. In that case, this Court stated the rule properly applicable to the instant case, in the following words:

"The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant enured in equity to the benefit of the plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways."

Silver v. Ladd, 7 Wall. 228

Shepley v. Cowan, 91 U. S. 330, was a case in which this Court held that when the officers of the Land Department had made an error of judgment upon the weight of the evidence presented to them, in a contested case before them, the unsuccessful contestant had no remedy in an action between the two parties, one of whom claimed under a patent from the United States issued on a preemption right acquired by a settlement of their ancestor, and the other under a patent issued by the Governor of the State of Missouri, this Court saying:

"If the matter were open for our consideration, we might perhaps doubt as to the sufficiency of the proofs presented by the heirs of Chartrand to the officers of the land department to establish a right of preemption by virtue of the settlement and proceedings of their ancestor, or by virtue of

their own settlement. Those proofs were, however, considered sufficient by the register of the local land office, by the Commissioner of the General Land Office on appeal from the register, and by the Secretary of the Interior on appeal from the commissioner. There is no evidence of any fraud or imposition practised upon them, or that they erred in the construction of any law applicable to the case. It is only contended that they erred in their deductions from the proofs presented; and for errors of that kind, where the parties interested had notice of the proceedings before the Land Department, and were permitted to contest the same, as in the present case, the courts can furnish no remedy. The officers of the Land Department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, *for mere errors of judgment upon the weight of evidence in a contested case before them*, the only remedy is by appeal from one officer to another of the department and, perhaps, under special circumstances, to the President. It may also be and probably is true, that the courts may furnish, in proper cases, relief to a party where new evidence is discovered, which, if possessed and presented at the time, would have changed the action of the land officers; but, except in such cases, the ruling of the department on disputed questions of fact made in a contested case must be taken, when that ruling is collaterally assailed, as conclusive."

Shepley v. Cowan, 91 U. S. 339-340

Shepley v. Cowan, *supra*, however, is also interesting and important as a case in which this Court plainly states the reasons why a preemptor or homesteader is not in pri-

vity with the United States until after he has made final proof, or cash entry, and a Receiver's final certificate has issued for the land, this Court, speaking through Mr. Justice Field, saying:

“Nor is there anything in this view in conflict with the doctrines announced in *Frisbie v. Whitney*, 9 Wall. 187, and the *Yosemite Valley* case, 15 Wall. 77. In those cases the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the preemption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or other public purposes for which real property is required by the Government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceased when all the preliminary Acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers, and ultimately to a patent of the United States. Until such payment and entry, the Acts of Congress gave to the settler only a privilege of preemption in case the lands were offered for sale in the usual manner; this is, the privilege to purchase them in that event in preference to others.

“But whilst, according to these decisions, no vested right

as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. So in this case, Chartrand, the ancestor, by his previous settlement in 1835 upon the premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his subsequent state selection in 1849. His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if in point of fact the reservation had then ceased. The reservation was asserted, as already mentioned, on the ground that the land was then claimed as a part of the commons of Carondelet. So soon as the claim was held to be invalid to this extent by the decision of this court in March, 1862, the heirs of Chartrand presented anew their claim to preemption, founded upon the settlement of their ancestor. The Act of Congress of March 3, 1853, 10 Stat. at L. 244, provided that any settler who had settled or might thereafter settle on lands previously reserved on account of claims under French, Spanish, or other grants, which had been or should thereafter be declared invalid by the Supreme Court of the United States should be entitled to all the rights of preemption granted by the Act of Sept. 4, 1841, after the lands were released from reservation, in the same manner as if no reservation had existed. With the decision declaring the invalidity of the claim to the land in controversy, all obstacles previously interposed to the presentation of the claim of the heirs of Chartrand and the proofs to establish it were removed.

According to the decisions in *Frisbie v. Whitney* and the *Yosemite Valley* case, Congress might then have withdrawn the land from settlement and preemption, and granted it directly to the State of Missouri, or reserved it from sale for public purposes, and no vested right in Chartrand or his heirs as against the United States would have been invaded by its action; but, having allowed by its subsisting legislation the acquisition of a right of preference as against others to the earliest settler or his heirs, the way was free to the prosecution of the claim of the heirs."

Shepley v. Cowan, 91 U. S. 338, 339

The foregoing case sufficiently shows the difference between the title held by a preemption or homestead claimant who has not made final proof and received a final receiver's certificate, and the title conferred upon its owner by a valid and subsisting mining claim.

A qualified person who has made a valid location upon a part of the public mineral domain acquires vested rights which no change in congressional policy can affect or impair. The possessory title to a mining claim, valid and subsisting, is real estate. It is a grant by the government to the locator of an interest in the public domain. A location made as provided by law, and possession in compliance with the local rules and customs, gives to the locator such an interest in the ground located as that the United States has no interest or estate therein that can be granted or conveyed to any other person; and in such a case the government holds the naked legal title in trust for the locator or his assigns.

Con. Mut. Oil Co. v. U. S., 245 Fed. 526 (C.C.A. 9th)

Erwin v. Perego, 93 Fed. 608, 611 (C. C. A. 8th)

Stenfjeld v. Espe, 171 Fed. 825, 828 (C. C. A. 9th)

Reed v. Munn, 148 Fed. 757 (8th C. C. A.)

Nev. Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 677

Belk v. Meagher, 104 U. S. 279, 283

Forbes v. Gracey, 94 U. S. 767

Noyes v. Mantle, 127 U. S. 348

St. Louis M. Co. v. Mont. M. Co., 171 U. S. 655

Ross v. Day, 232 U. S. 110, was a case involving a Cherokee allotment contest, and the question was which one of the contestants had improved the lands in such a sense as to give them a preferential right of selection under the Act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), Section 11. The following quotation from the opinion of this court, sufficiently shows that it cannot in any manner be an authority or rule of decision in favor of the defendants' contention in this case, that the action of the Secretary of the Interior in granting the oil and gas lease in controversy to the defendant the Federal Oil & Development Company is final and not reviewable by the courts:

"The contention of the plaintiffs in error here, as in the court below, is that under the laws of the Cherokee Nation and the act of Congress they acquired the right of possession of the lands in controversy by virtue of the bill of sale from Keeler, dated November 1, 1902, and thereby succeeded to the same right to allot these lands that Keeler had before; that this right was made exclusive by what was done on March 1, 1904, looking to the placing of improvements upon the tracts; that this was sufficient to give notice to other citizens of the Cherokee Nation of the intention of plaintiffs to locate the lands, and that defendant was present at the time and had actual notice of the work done by Dr. Ross. Reference is made to the Constitution of the Cherokee Nation, art. I, sec. 2, and to its Laws (1892), secs. 706, 761, and 762. It will not be necessary to recite them at length, because all that is claimed with respect to their effect upon the present controversy was conceded or assumed in the decision of the Secretary of the Interior; that is, that citizens of the Cherokee Nation might improve portions of the public domain within the Nation, and thereby establish a prior right to the possession of the improved lands, which right might be transferred to another citizen by the sale of the improvements. The Secretary evidently construed section 11 of the act of Congress of July 1, 1902, as recognizing and confirming this right. But he held that

no valuable interest was acquired by plaintiffs under the purchase from Keeler, because Keeler owned no improvements of material value. He found plaintiffs were not entitled to credit for the small improvement of the noncitizen Bixler, and there is nothing before us to show that the Keeler bill of sale included the Bixler improvements, or that Bixler held as tenant either of Keeler or of plaintiffs. And he held in effect that the question of the sufficiency of what was done by contestants on March 1, 1904, depended not upon whether it was sufficient to give notice to contestee, but whether it was sufficient to constitute an improvement within the meaning of the act of Congress. And so the whole controversy in effect depended upon whether the allotment to defendant was in accord with the ownership of the actual improvements upon the land, and the fact respecting the improvements was the principal matter to be determined in the contest proceedings, wherein the final appeal was to the Secretary of the Interior."

Ross v. Day, 232 U. S. 115, 116

Ross v. Day, *supra*, was thus a contest between claimants asserting adverse claims, dependent upon the different improvements each contestant had placed upon the land, as being sufficient to constitute such an improvement within the mean of the act of Congress, as would entitle the allottee to select the land upon which the improvements were made as part of his allotment. Neither contestant had or could claim any equity in the improvements placed upon the land by the other, as the improvements were never made or held by them as cotenants, but on the contrary were made and held under a hostile claim of title asserted by each.

In their brief in the Circuit Court of Appeals the defendants made the following statement:

"In spite of all the dignity that may appertain to an unpatented mining location it has always been incumbent upon the claimant thereof to make timely assertion of his claims in the land office or be cut off by other disposition of the land. It also lies at

all times within the power and right of the United States through its General Land Office to inquire into the validity of such claims, to cancel those that are invalid, and to determine with finality that a particular claimant is the true owner. The right to initiate inquiry into the validity of a claim of its own motion and without specific legislation is firmly established by *Cameron v. United States*; 252 U. S. 450; 64 L. Ed. 659. *A fortiori* the right exists to determine all such questions necessary to the carrying out of the Act of Congress of February 25, 1920."

This argument of the defendants might be pertinent if the plaintiff were asserting his right to an interest in the lease under an independent and hostile mining location, adverse to the mining location upon and by virtue of which the defendant the Federal Oil & Development Company applied for and obtained the lease in controversy in this action. The right of the Interior Department to challenge the validity of a mining location in its entirety is not questioned after due notice and a hearing on the facts. But the Department of the Interior has no jurisdiction or authority to cancel a valid association oil placer mining claim as to a part of the colocators and co-owners, and at the same time sustain its validity as to the remaining colocators and co-owners, and then issue a patent, or in this instance its equivalent, an oil lease, to the entire claim, and exclude colocators and co-owners therefrom whose title is not shown to be divested or acquired by the co-owners and cotenants in whose favor the validity of the claim is upheld.

Downs v. Hubbard, 123 U. S. 189, was a case involving a floating land grant that had been brought to rest and located upon land other than and miles away from the land which the plaintiff in that action claimed under a derivative title from the original grantees in the land grant. The amount of land finally awarded to the original grantees in the grant was for a less amount than they had originally claimed and disposed of by deed before the grant was finally located and confirmed, and did not include within its

boundaries the land they had sold to the plaintiff in that case before the location and confirmation of the grant. The action did not seek to impose a trust upon the land finally located and granted, the original bill of complaint and amended bill which did seek that relief having been dismissed by the plaintiff before final hearing, so far as by the prayer it was sought to hold the defendant Craig liable as trustee for the complainant of the title to the lands conveyed to him. (See statement of facts in the case in 123 U. S., pp. 198-199.) And the amended and supplemental bill of complaint upon which the case was finally tried in the lower court and decided by this court, sought only to control the action of the Land Department in granting a patent to the original grantees and their successors in interest for other land than that claimed by the plaintiff in that action, which sought to set aside the action of the Land Department in that respect. This Court properly held that it was not the province of a court of equity to interfere with and control the action of the Land Department in disposing of land to which no claim was made by the plaintiff in the equitable action by which their acts were sought to be set aside, and that the only remedy of the plaintiff in that action, if he had a remedy, was by a writ of mandamus to compel the Secretary of the Interior and the Commissioner of the General Land Office to allow an appeal from their action taken under a presidential order, alleged to be invalid, in fixing the locus of the grant and issuing a patent therefor upon land other than that claimed by the plaintiff through the original grantees of the grant when it was first made and before its boundaries were ascertained and delimited by the Land Department of the United States. That action did not seek to impress a trust upon any land claimed by the plaintiff, or upon any land patented to the defendant Craig, but sought only to control the action of the Land Department in issuing a patent to land for which the plaintiff in that case had and made no claim. Just what authority that case can be in the case at bar we admit we

are too dense to see, and we do not think that any impartial mind can discover that it applies as an authority in any way to the instant case.

The defendants also rely upon the cases of:

Sparks v. Pierce, 115 U. S. 408
St. Louis Smelting Co. v. Kemp, 104 U. S. 636
Quinby v. Conlan, 104 U. S. 420
Boggs v. Merced Mining Co., 14 Cal. 279

The case of Sparks v. Pierce, 115 U. S. 408, was a contest between a squatter on the public domain and the owner of a patented placer mining claim. The squatter in that case settled on the land, but made no effort to secure the title to it under the laws of Congress or a right of possession under the local customs and rules of miners, and was never in privity of estate with his adversary or with the Government of the United States. This was a case of two adverse claimants asserting rights under separate, distinct and hostile titles. There was no relation of cotenancy existing in that case, nor any fiduciary relation, or relation of trust and confidence, as exists in the case at bar.

The case of St. Louis Smelting Co. v. Kemp, 104 U. S. 636, was a contest between a squatter on the public domain and the patentee and owner of a patented placer mining claim. The defendants in that case claimed no right or title to the ground in controversy under any law of the United States, but simply asserted a right arising from prior possession of the ground by them before the location and entry of the patented placer mining claim. This case was therefore a contest between adverse claimants, asserting adverse rights and claims based upon wholly distinct, different and hostile titles. They were not cotenants, and there existed between them no fiduciary relation, and no ownership in common of the title each was asserting, such as exists between the plaintiff and defendants in the case at bar.

The case of Quinby v. Conlan, 104 U. S. 420, was a contest between two claimants under the preemption law, one

of whom had made entry and settlement while the land was still open and unappropriated and had carried his settlement and entry to patent. The other had settled upon the land after the settlement and entry by his successful adversary, also claiming a right to enter it under the preemption laws. It is plain that there can be no relation of cotenancy between two settlers claiming the same tract of land under different settlements and entries under the preemption law. Their rights are adverse from their inception, and their titles are based upon separate, distinct and hostile claims, and under such state of facts there can be no fiduciary relation, no tenancy in common, and no common ownership of title, all of which exists between the plaintiff and defendants in the case at bar.

Boggs v. Merced Mining Co., 14 Cal. 279, was a contest between a trespasser who had squatted upon land without making any attempt to enter it under the laws of Congress or under the laws of the State of California, and the owner of the land under a patent from the United States; and in that action the trespasser sought a decree to cancel the patent from the United States as having been granted in fraud of the Government, without claiming or showing any privity of estate with the Government, or any title of any kind in himself. That was also a case where adverse claimants asserted separate, distinct and hostile titles, and in that case there could be no question of tenancy in common, or any fiduciary relation, or a continuing and subsisting trust, such as is shown to exist between the plaintiff and defendants in the instant case, by the admitted facts contained in the record in this case.

In all of the above cases the plaintiff sought to set aside, vacate and annul the action of the Secretary of the Interior in granting the patent to another, and to have the patentee declared to be holding the entire estate under the patent in trust for an adverse claimant who asserted a right thereto under a wholly adverse, independent and different claim of title to the patentee. Those actions were wholly different

from an action brought to enforce a title to an undivided interest in the instrument of title issued by the Government and the premises covered thereby, as is sought to be done by the plaintiff in the instant case, who seeks to enforce a trust to an undivided one-eighth interest in an oil lease and the oil produced thereunder, issued to his tenant in common, who purposely and faithlessly excluded him from the application filed by that tenant in common for the entire tract of land covered by their joint location of an association oil placer mining claim, in which all the colocators and co-owners hold a common undivided title based upon and having its inception in the joint act of discovery, location and maintenance of the claim, which was the identical mining title presented to the Land Department and relied upon by the defendant the Federal Oil & Development Company to procure the lease for the O'Glase claim. The Land Department cannot cancel a valid and existing mining claim as to one colocator and co-owner and his heirs and assigns on the ground that the location is invalid, and in the same proceeding hold that the location is valid as to the successor in interest of four of the other colocators and co-owners, and award the entire mining claim to the co-owner of an undivided interest in it.

The defendants, in the Circuit Court of Appeals, took the position, and they will doubtless urge it in this Court, that, "The award of a Government lease to defendant stands as an adjudication in rem which plaintiff cannot attack," and placed their position on the following grounds: (We are quoting from their brief in the Circuit Court of Appeals.)

"Plaintiff does not show that he or his predecessors were ever entitled to a lease. In fact it appears clearly that they were not entitled to a lease. As a condition precedent to granting a lease, Section 18 of the Leasing Act makes certain definite requirements. It was necessary, in the first place, to apply for a lease. Plaintiff did not do that; although the way was open to him, under Regulation No. 24½,

to base an application upon a claim to a fraction. He did not relinquish his claims under the Mining Act. He did not show, or offer to show, that prior to July 1, 1919, he was in undisputed possession of the land. He has made no attempt to pay the Government one-eighth of the value of any oil and gas that he and his predecessors may have produced. These are not formal matters; they are the very conditions precedent to obtaining a lease. The period of time within which these matters had to be done expired with August 25, 1920."

Our answer to the foregoing position of the defendants, is:

(1) The heirs of George McManus did not make a *personal or direct* application for a lease, it being impossible and impracticable for them to apply for a lease based on a property right that they did not know existed; but the application for an oil lease within six months after the passage of the Oil Leasing Act by their co-owner and cotenant the Federal Oil & Development Company was in law their application; the ownership of the O'Glase placer mining claim was the first condition precedent to the application for an oil lease from the Government, based, as the application in the instant case was based, on the O'Glase location; the exercise of the right to apply for and receive an oil lease on this mining claim by the defendant the Federal Oil & Development Company, who was a co-owner and cotenant with the heirs of George McManus in that mining title, and held in common by them, was the exercise of a right vested in them by the law as such co-owners, and the exercise of this right by one co-owner, was the exercise of the right by all the co-owners, and inured to their common benefit, unless expressly disaffirmed. The exercise of the common right to apply for and receive an oil lease from the Government, by the defendant the Federal Oil & Development Company, has been ratified and confirmed by the heirs of George McManus and this plaintiff in bringing this suit to impress a trust upon an undivided interest in the oil lease obtained through the defendant's application.

(2) The Federal Oil & Development Company relinquished its title to the O'Glase mining claim and attempted to relinquish the title of the heirs of George McManus; that attempted relinquishment of the entire title to the O'Glase mining claim by the Federal Oil & Development Company to the Government, although wrongful and illegal in the first instance, has been ratified and confirmed by the heirs of George McManus and this plaintiff by the bringing of this action; and in law the relinquishment of the defendant was and is their relinquishment.

(3) The plaintiff has not only offered to show, but has shown, by allegations in the bill of complaint, (R. 5.) which stand admitted under the motions to dismiss, that the plaintiff's predecessors in interest were in undisputed possession of the O'Glase claim prior to July 1, 1919, that it has been claimed by George McManus and his co-owners and that they have remained in the continuous and undisturbed possession of the claim from the time of its location on January 11, 1887, down to the time of the commencement of this action. (R. 5.)

(4) Since the oil lease has been granted to the Federal Oil & Development Company, we may assume that it paid, or attempted to pay, as royalty to the United States, an amount equal to the value at the time of production of one-eighth of all the oil and gas already produced, except oil or gas used for production purposes on the claim, or unavoidably lost, from said land; this payment by the defendant, if any was made, which we do not concede, as oil in commercial quantities was not produced prior to the granting of the lease, inured to the benefit of its co-owners; its payment was their payment; the bringing of this action and the offer to do equity in the premises by the plaintiff, which is in effect an offer to pay the proportionate share of any expense incurred by the Federal Oil & Development Company in procuring the lease, is a ratification of the defendants' action in paying this royalty, if any royalty had ac-

crned prior to the granting of the lease, which is negatived by the allegations of the bill.

The defendants also base their contention that the granting of the oil lease by the Secretary of the Interior was a final adjudication of the rights of the heirs of George McManus, upon Rule 24½ of the Regulations adopted by the Secretary to accomplish and carry out the purposes of the Oil Leasing Act. The following is the rule in question:

"24½. WHO MAY APPLY.—All proper parties to a claim for relief under section 18, 19, or 22 of the act should join in the application, but, if for any sufficient reason that is impracticable, any person claiming a fractional or undivided interest in such claim may make application for a lease or permit, stating the nature and extent of his interest, and the reasons for nonjoinder of his co-owner or co-owners. In cases where two or more applications are made for the same claim or part of a claim, leases or permits will be granted to one or more of the claimants, as the law and facts shall warrant and as shall be deemed just."

That rule provides that if the owner of an undivided interest desires to apply for a lease he may do so by filing an application naming his co-owners who failed or refused to join in the lease, and giving the reasons for their nonjoinder, and thereupon an oil lease shall issue to the one so applying. The Land Department then assumes the power to declare and regard the non-joining co-owner as not only having waived his privilege to apply for a lease, but also to have forfeited and lost a vested interest in the property owned in common by the excluded co-owner and the applicant for the lease. See, *C. D. Murane*, 48 L. D. 526. In the instant case the defendant the Federal Oil & Development Company failed to comply with this Rule, but disregarded it, by applying for a lease as the person presenting and claiming the entitle title to the claim. The defendants cannot by reason of their failure to comply with the law be heard to say that the plaintiff, who was thus not brought to the notice of the Land Department, has lost his right to

assert his claim for relief in equity in the proper court. Their illegal act and the concealment cannot be made the basis for denying the plaintiff access to the courts for ascertainment and establishment of his right in equity. He is not to be held to have waived any right or privilege which they admit he had (R. 2-3-4-6-7-18-25.) *and they concealed from the Department.* The oil lease having been granted, and jurisdiction of the United States having thus **terminated, the defendants by their illegal act and claim** cannot oust the jurisdiction of the Courts to give to plaintiff his relief in equity that he establishes himself to be entitled to. We shall have more to say as to the construction placed on these Regulations by the defendants in a following subdivision of this brief. But that the Secretary of the Interior does not consider that his disposition of the matter by issuing an oil lease is final and not reviewable by the courts, is plainly shown by Regulation 24, which is as follows:

“24. Beneficiaries Under Leases or Permits.—All leases or permits under sections 18, 19, and 22 shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject to the same limitations as to area and acreage as is provided for claimant, but such persons will not necessarily be made parties to Government leases, and may assert their rights in the courts. Disputes of this character are not to be confused with adverse claims based upon independent title, hereinafter referred to. (See sec. 28 hereof.)”

That Regulation is an explicit declaration by that official, that all persons whose rights in the oil placer claim are within the purview and meaning of the inuring clause not only *may*, but *must*, assert their rights in the courts after the granting of the lease, and that the Land Department in the proceedings upon the application for an oil lease will not even attempt to adjudicate the rights of co-owners of the mining claim among themselves as to their undivided

interests in the common title, and the Regulation (24) distinctly differentiates the claim of a co-owner and cotenant of the mining claim for which a lease is issued, as in the case at bar, from an adverse claim based upon an independent title, referred to in Rule 28 of the Regulations. And thus Regulation 24 is a construction given to the Act of Congress by the Land Department, that its action in the matter of granting an oil lease is not final, but must be reviewed by the courts.

The McManus title having attached by reason of the location and maintenance of the O'Glase claims, it continues under the oil lease granted, and was not divested by the pretended relinquishment of the McManus title by the Federal Oil & Development Company.

Swor v. Morris, 227 U. S. 523

THE CLAIM OF GEORGE McMANUS AND HIS HEIRS
IS EMBRACED WITHIN AND PROTECTED BY
THE INURING CLAUSE FOUND IN SECTION
18 OF THE MINERALS LEASING ACT OF
FEBRUARY 25, 1920, 41 STAT. 537, 443.

The Inuring Clause found in Section 18 of the Act is as follows:

"All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear."

The plaintiff's rights under the Inuring Clause are pleaded in Paragraph 34 of the Bill of Complaint, (R. 19-20.) and were urged in the court below, but the lower court denied this right set up and claimed by the plaintiff under this clause of Section 18 of the Minerals Leasing Act.

The Minerals Leasing Act of February 25, 1920, is not a repeal, but an amendment, of the existing mining laws. It does not contain a repealing clause. It must, therefore, be construed in the light of the existing mass of judicial decisions interpreting and applying the mining statutes of which it is a part. The decisions of the courts, therefore, construing and applying the law of which the Oil Leasing Act is a part, must naturally be read into and construed as a part of the Act, when any of its provisions are to be interpreted and applied. Thus read, the contention of the defendants that the inuring clause contained in the Act is applicable only to claimants for a lease and their sub-lessees, and those claiming under an express contract with the claimant, is to say that Congress indulged in a vain enactment, as such interests as were held by third parties under a contractual relation with the successful applicant for a lease, were already secured to such subordinate claimants by the general principles of law and equity as applied by the courts in the cases next cited, applying the equitable doctrine of trusts and fiduciary relationship to lessors and

lessees, and others standing in privity with each other through a contractual relation.

Stuart v. Westlake, 148 Fed. 349 (8th C. C. A.)

Lowry v. Mining Co., 179 U. S. 196

Rector v. Gibbon, 111 U. S. 276, 291

It is the contention of the defendants that the Inuring Clause is a statute of exclusion, and that the equitable doctrine of trusts as applied to tenants in common is abolished by its terms; that a co-owner and cotenant of a mining claim for which an oil lease has been issued has no rights that are enforceable in the courts; that the act of one co-owner in securing to himself the legal title to the common property through an administrative department of the Government divests any one or more co-owners and cotenants who did not join, or are not joined, in the application for a lease, of their title and interest in the common property; that the title to common property so obtained does not inure to the benefit of the excluded co-owners; and that the issuance of the lease extinguishes the title of the excluded co-owners and cotenants, and thereafter such excluded cotenants are remediless in the premises. The foregoing statement of the far-reaching effects claimed for the Inuring Clause by the defendants and their counsel, is sufficient to show how impossible such a conclusion is, when the clause is read by an impartial mind in the light of existing law. If Congress had intended that the meaning of the Inuring Clause should be that the statutory declaration of ownership in common of a mining claim made by Section 2324 of the Revised Statutes of the United States, should be repealed, and that the long-established rules of law and principles of equity as to tenants in common and the fiduciary relationship created by such a status should be abrogated, and that a person owning an undivided interest in a mining claim should be excluded from the benefit of the statutory rule of ownership in common of mining claims, and of the doctrines of equity impressing a trust

upon property rightfully belonging to him, the legal title to which has passed into the hands of his co-owner, then it is reasonable to suppose that Congress would have made its purpose to cause so radical a departure from the law of the land clear and indisputable by a direct declaration and enactment to that effect, which could easily have been written in a few lines, declaring that henceforth all titles to mineral lands issued under the Minerals Leasing Act should be forever freed of any existing equities. No such declaration is found in any part of the Leasing act, and no such effect can be attributed to it. It is indisputable that the Minerals Leasing Act is a part of the mining laws of the United States, is not repugnant to the body of mining statutes of which it is a part, but is consistent therewith and in *pari materia* with them, governed by the same rules of law and principles of equity that give effect to those statutes, and subject to the settled rule of construction that "all statutes in *pari materia* are to be read and construed together, as if they formed part of the same statute, and were enacted at the same time."

Potter's Dwarrris on Statutes, 145

Board of Commissioners v. Aetna Co., 90 Fed. 222

The rule of construction by the aid of statutes in *pari materia* does not restrict the court to the consideration of other legislation enacted on the same day or at the same session. The use of the rule is to ascertain the intention of the legislature by reference to other enactments relating to the same matter or subject, to the same person or thing, or to the same class of persons or things.

Ind. Traction Co. v. Ramer, 76 N. E. 808, 810

Jackson Co. v. Brannaman, 82 N. E. 65

The *ejusdem generis* rule of construction, which the defendants invoke to escape the effect of the inuring clause of the Oil Leasing Act, cannot be applied if the clause is construed so as to give meaning to all its expressions, and not to exclude words to which some meaning must be given or else rejected as surplusage. The very language of the clause commencing, "All leases hereunder shall inure to

the benefit of," is the language of the law of cotenancy, always used by the courts when describing the passage of the title of other cotenants that has been obtained wrongfully or surreptitiously by one cotenant, or a superior title in the common property so obtained, to the exclusion of the other cotenants. The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the Legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the lawmakers. The general object of an act sometimes requires that the final term shall not be restricted in meaning. A cotenant is certainly within the meaning and purview of the statute. The inuring clause is simply a recognition of the principle applied in all the mining cases, where a cotenant has been excluded from a mining patent, and holding the patentee as a trustee for the undivided interest of the excluded cotenant. The use of the word "lease" does not confine it to prior leases on the unpatented claim personally made by the recipient of a lease from the Government, as the use of the words "*through or under*" being in the disjunctive, makes the clause plainly applicable to oil leases received from the United States, as the excluded cotenant claims "*by*" that lease, and "*through*" his co-owner who has obtained it to his exclusion, and holds such Government oil lease as a trustee, under both the statute and the well-established principles of equity.

Willis v. St. Paul Co., 48 Minn. 40

The co-owner of a placer mining claim, who has been excluded from the application for an oil lease made by a co-owner and cotenant of the claim, and whose rights have not been recognized or reserved in and by the oil and gas lease granted by the Government to the faithless and overreaching co-owner, is, when he, the excluded co-owner, seeks to enforce his rights in the premises and impress a trust upon the oil lease issued, by means of a suit in equity, as in the instant case, distinctly and explicitly, a person,

"claiming through," the lessee to whom the lease is granted who is designated in the statute as "the claimant," and such excluded co-owner claims "through him," (the claimant or lessee) "by lease," to-wit, the oil lease already issued to the claimant, who is now the holder, as trustee, of the full legal title to the mining claim held in common by "the claimant" and his excluded co-owners and cotenants. The excluded co-owner has still an equal interest in the claim with the lessee, who is still a cotenant, but the excluded cotenant "claims" his undivided interest in the legal title, *evidenced by the lease*, "through" "the claimant" who has procured to himself that legal title, based upon and having its inception in the possessory mining title held and owned in common by the oil lessee and his excluded co-owner.

We now ask, why should it be necessary to say by a statutory enactment that a title granted by the Government "*shall inure to the benefit of the claimant*," when the claimant is the person who receives that title evidenced by the lease issued? It is futile to talk about saving a person's rights in a piece of property to which he has the written title. If the "claimant and all persons claiming through or under him," are not the direct beneficiaries of the rights granted by the written instrument issued by the Government, of what use is that written instrument known as an oil lease? The grant or lease itself passes the title, and thus saves the rights of the claimant and his sub-lessees or other persons who may claim an interest in the property from him obtained by means of a contract, such as of sale, purchase or mortgage, and such a construction as the defendants contend for, reduces the entire inuring clause to a non-sequitur. Furthermore, the application of the *ejusdem generis* rule to the clause wholly ignores and makes meaningless the last words in the clause, "*as their interests may appear*." How appear? Certainly not exclusively by the written lease from the Government, or the sub-lease, or contract of purchase, or mortgage, or royalty contract, given by the Gov-

ernment's lessee prior to receiving his lease, as those interests had already been saved to the claimant and his contractual privies by solemn instruments in writing, that needed no statutory enactment to make them binding upon the claimant for, and recipient of, an oil lease, who had previously executed them, however dishonest his intentions might be. But when we consider the entire concluding phrase "*or otherwise, as their interests may appear,*" it is then plain to be seen that Congress had in mind the saving of any interest or estate arising on a claim that does not appear from or is not referable to the instrument of title, viz., an oil lease, that the Land Department issues to the claimant, but must be shown by anterior and extrinsic facts and evidence relating to the original mining title upon which the lease is granted. Such an interest or estate is that of a tenant in common. It has never been deemed necessary to say by a statutory enactment that the rights and title evidenced by a mining or land patent issued by the Government should inure to the patentee. The instrument itself conveys the right and title. An oil lease does not differ from a patent, except that it transfers the title for a term of years, instead of absolutely. To say that a title evidenced and transferred by a deed of conveyance, *and an oil lease is a conveyance*, "*shall inure to the benefit*" of the grantee named in the instrument of conveyance, and his successors in interest, *or those holding under him*, is to trifle with the well-established definitions of what such an instrument is and its effect as a conveyance of an estate in real property. The inuring clause must apply to and include the rights of co-owners and cotenants of the successful claimant for a lease. Otherwise the entire clause is nonsense. To give the inuring clause the construction contended for by the defendants is to deny to the general words, "*or otherwise, as their interests may appear,*" all meaning or import whatever, and that is justified by no rule of construction.

This Court had occasion to consider the *ejusdem generis*

rule in the case of *United States v. Mescall*, 215 U. S. 26, a case in which the defendant was indicted under section 9, chapter 407, Laws of June 10, 1890, 126 Stat. at L. 131-135, charging the defendant as an employee in the customs service with making and returning false weights in connection with an entry of imported merchandise. The defendant demurred to the indictment, on the ground that an employee in the customs service was not within the meaning of the clause "or otherwise," contained in that act, which so far as is material to this case, is as follows:

"That if any owner, importer, consignee, agent, or other person shall make, or attempt to make, any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof . . . etc."

The trial court sustained the demurrer to the indictment on the ground that it was apparent from its allegations that the defendant was not in fact any of the persons within the contemplation of section 9 with relation to these particular importations, and could not be considered either an owner, importer, consignee, agent, or other person, and that, as to the offense charged, the statute, properly construed, did not include the defendant, invoking the *ejusdem generis* rule in support of his contention. But this Court reversed the decision of the lower court and held that such a construction of the words "or other person" rendered that clause meaningless and surplusage, the court saying:

"Counsel for defendant invokes what is sometimes known as Lord Tenderden's rule,—that, where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described,—*ejusdem generis*. The particular words of description, it is urged, are 'owner, importer, consignee, agent.' The general term is 'other person,' and

should be read as referring to someone similar to those named, whereas the defendant was not owner, importer, consignee, or agent, or of like class with either. He was not making, or attempting to make, an entry. He represented the government, and, contrary to his duties, was rendering assistance to the consignee, who was making the entry. But, as said in *National Bank v. Ripley*, 161 Mo. 126, 132, 61 S. W. 587, 588, in reference to the rule:

‘But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument . . . Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.’

“See also *Gillock v. People*, 171 Ill. 307, 49 N. E. 712, and the cases cited in the opinion; *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788; *Matthews v. Kimball*, 70 Ark. 451, 462, 66 S. W. 651, 69 S. W. 547. Now, the party who makes an entry, using the term ‘entry’ in its narrower sense, is the owner, importer, consignee, or agent; and it must be used in that sense to give any force to the argument of counsel for defendant; but, used in that sense, the term ‘other person’ becomes a surplusage. In sec. 1 of chap. 76, Laws of 1863 (12 Stat. at L. 738), is found a provision of like character to that in the first part of the section under which this indictment was found, but the language of the description there is ‘owner, consignee, or agent.’ This was changed by

sec. 12, chap. 391, Laws 1874 (18 Stat. at L. 188), to read 'owner, importer, consignee, agent, or other person,' and that description has been continued in subsequent legislation. Evidently the addition in 1874 of the phrase 'other person' was intended to include persons having a different relation to the importation than the owner, importer, consignee, or agent. Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee, or agent, or else the term 'other person' was a meaningless addition. Now, the defendant was a person, other than the owner, importer, consignee, or agent, by whose act the United States was deprived of a portion of its lawful duties. His act comes within the letter of the statute as well as within its purpose; and the intent of Congress in the legislation is the ultimate matter to be determined."

U. S. v. Mescall, 215 U. S. 26, 31

Bank v. Ripley, 161 Mo. 126, 61 S. W. 587

The ejusdem generis rule was again under consideration by this Court in the case of *Mason v. U. S.* 260 U. S. 545, in which an executive order of withdrawal dated December 15, 1908, was under consideration. The executive order is in the following words:

"To secure the public interests, and in aid of such legislation as may hereafter be proposed or recommended, the public lands in townships 15 to 23 north, and ranges 10 to 16 west, Louisiana meridian, Natchitoches Land Office, Louisiana, are, subject to existing valid claims, withdrawn from settlement and entry, or other form of appropriation." In that case the contention was that the general words of the order, "or other form of appropriation," must be read in connection with the specific words "settlement and entry," immediately preceding, and that so read, they must be restricted to appropriations of a similar kind with those specifically enumerated. But the Supreme Court declined to accede to this contention, saying:

“The point sought to be made rests upon the rule of statutory construction that words may be so associated as to qualify the meaning which they would have standing apart. Here, it is said, the general words of the order, ‘or other form of appropriation,’ must be read in connection with the specific words ‘settlement and entry,’ immediately preceding; and that, so read, they must be restricted to appropriations of a similar kind with those specifically enumerated. The words ‘settlement and entry,’ it is said, apply only to the act of settling upon the soil and making entry at a land office; as, for example, under the Homestead Laws; that mining lands are acquired, not by settlement or entry, but by location and development; and that this process is not covered by the words ‘other form of appropriation,’ limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of construction, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate. If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized? None has been suggested, and we can think of none. A purchase of land or an appropriation for railroad uses or rights of way, if not actually involving settlement and entry, is no more akin to that method than an appropriation for mining purposes. Reasons which, under the rule, would justify the

exclusion of one from the operation of the general words would equally justify the exclusion of all. It would therefore result, there being nothing ejusdem generis, that the application of the rule contended for would nullify the general words altogether."

Mason v. U. S., 260 U. S. 545

Danciger v. Cooley, 248 U. S. 319, 326

Higler v. People, 44 Mich. 299

U. S. v. First Nat. Bank, 190 Fed. 336, 344

In the case of Carpenter v. Mitchell, 54 Ill. 126, 131, the Supreme Court of Illinois construed the meaning of the phrase "or otherwise," occurring in a statute known as a "married woman's law." That statute declared "that all property belonging to a married woman as her sole and separate property, or such as she owns at her marriage after the passage of the law, or which she may acquire in good faith from any person other than her husband, by *descent, devise or otherwise*, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and controlled by her as if she were sole owner and unmarried." This statute contains an enumeration of specific means of acquiring property by a married woman, followed by the general words "or otherwise," used in the same context and the same relation as they are used in section 18 of the Minerals Leasing Act, and in holding that they included property acquired "by purchase," that the Supreme Court of Illinois said:

"This provision contemplates the acquisition of property in different modes by married women, and a fair interpretation of the language employed embraces a purchase by her. It names the acquisition by descent and devise, and instead of limiting it to those modes, enlarges the power by recognizing other unenumerated modes, by the expression 'or otherwise,' which is broad enough to embrace a purchase."

This is a distinct holding by an able court that the expression or phrase "or otherwise," are words of inclusion,

and not of limitation to the same or similar classes of rights or things embraced in the preceding words of the statute, and the decision is squarely in point and upholds in all things the contention of the plaintiff in the instant case as to the meaning of the phrase "or otherwise," found in the inuring clause of the Minerals Leasing Act of February 25, 1920.

To the same effect is the case of *Wilson v. Board of Trustees*, 133 Ill. 443, 463, 464, 468, the court saying:

"And the fact that the language employed is, in form, in the first clause, specific, and in the second clause, generic, admits of no other conclusion than that it is intended the second clause shall be more comprehensive than the first."

The words "or otherwise," used in the Illinois constitution of 1870, providing two special modes of local improvements might be authorized to be made, were construed by the same court to include and authorize the making of local improvements by other methods than those specifically enumerated in the specific clause preceding the words "or otherwise," the court saying:

The words "or otherwise," used in the Illinois constitution in respect of the two specific modes by which local improvements might be authorized to be made, *refer to still other methods of providing for the making of such local improvements*, and cannot, by any rule of construction, be held to affect such special modes, or to authorize the combination thereof in respect of any single improvement. The clause under consideration is treating of local improvements generally, and the language employed is applicable to the general subject. The words "or otherwise," were probably inserted to prevent any possible construction of the clause which would render the special modes enumerated exclusive, and a limitation upon the power of the legislature to vest such corporate authorities with power to make local improvements in any other manner."

Kuehner v. City of Freeport, 143 Ill. 92, 98, 99.
Chicago v. Brede, 218 Ill. 528.

The case of *Gillock v. The People*, 171 Ill. 307, was a case in which the defendant convicted of burglary of a chicken house sought to reverse his conviction on the ground that such a building was excluded by the *ejusdem generis* rule from the expression or words "or other buildings," used in a statute specifically defining in the preceding clause the buildings to enter which with intent to commit certain crimes would constitute the crime of burglary, the defendant insisting that the general words "or other building," used in the statute must be construed to mean only buildings of the same kind as those previously specified, under a well-known rule of construction that "where a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general words treated as referring to matters *ejusdem generis* with such class." But the Supreme Court of Illinois would have none of it, the court saying:

"The attempt is to construe this rule so that when applied to our statute the crime of burglary is only committed when the building entered is of the same kind as 'dwelling house, chicken house, storehouse,' etc. named in the statute. To limit the meaning of the words 'other buildings,' as used in our statute, to buildings *ejusdem generis* with those specifically named, would be to render the general words practically meaningless. What building, not a dwelling house, legally speaking, is of the same kind as a dwelling house? And so with each of the other buildings mentioned. Sutherland, in his work on statutory construction, speaking of the rule under discussion, which does not allow general words to include others of a superior class to those specified, says: 'But when the result of thus restricting the general words would be that they would have no effect at all, they must be extended to things superior in quality to those enumerated.' And he adds: 'For the same reason the restriction of general words to things *ejusdem generis* must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is some-

times so complete and exhaustive as to leave nothing which can be called *ejusdem generis*. If the particular words exhaust a whole genus, *the general words must refer to some larger class.*' (Secs. 278, 279). And again he says: 'This rule can be used only as an aid in ascertaining the legislative intent, and not for the purpose of contravening the intention, or of confining the operation of the statute within narrower limits than was intended by the lawmaker.' Citing among other cases *Woodworth v. State*, 26 Ohio St. 196. The language of the Ohio statute is: 'If any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable or other officer in the execution of his office, the person so offending,' etc. and it was held that the words included supervisor of roads and highways. It was contended the words 'or other officer' were to be limited in their meaning to officers connected with the administration of justice under the direction of the court, but it was held otherwise, the court saying: 'Now, it must be remarked that the rule of construction referred to above can be used only as an aid in ascertaining the legislative intention and are for the purpose of confining the operation of the statute within limits other than those mentioned by the lawmaker. It affords a new suggestion to the judicial mind, that when it clearly appears that the lawmaker was thinking of a particular class of persons or objects, words of more general description may not have been intended to embrace those not within the class. The subject is one of common sense. Other rules of construction, are, however, equally potent, especially the primary rule which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute. Another well established principle is, that even the rule requiring the strict construction of a penal statute, as against the prisoner, is not violated by giving every word of the statute its full meaning, unless restrained by the context.' It is also said by Endlich on the Interpretation of Statutes, Section 410, 'The general object of the Act, also, sometimes requires that the final

generic word shall not be restricted in meaning by its predecessors."

Gillock v. The People, 171 Ill. 308, 311

Woodworth v. State, 26 Ohio St. 196

People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121

This rule of construction is by no means of universal application, and its use is to carry out, not defeat, the legislative intent. It must yield to another salutary rule of construction, viz., that every part of a statute should, if possible, be upheld and given its appropriate force.

Misch v. Russell, 136 Ill. 22, 26 N. E. 528

Hills v. Joseph, 229 Fed. 866

Regina v. Edmundson, 2 Ellis & Ellis 77

Daggett v. Collins, 18 C. B. 668

The rule that where an enumeration of specific things is followed by general words or phrases, the latter are held to refer to things of the same kind as those specified, is only one of the many rules of construction which are employed for the purpose of ascertaining the intention of the legislature, or of the contracting parties, as expressed in a statute or contract sought to be construed; and where, from the whole instrument a larger intent may be gathered, the rule under consideration will not be applied in such manner as to defeat such larger intent; or the rule will not be applied where from the whole statute or contract a larger intent may be gathered, if the application of the rule will operate to defeat such larger intent.

The restriction of general words to things ejusdem generis must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called ejusdem generis. If the particular words exhaust a whole genus, the general words must refer to some larger class. In the case at bar, to limit the meaning of the general words "or otherwise," as used in the

inuring clause of the Minerals Leasing Act to claims essentially contractual in their nature, or ejusdem generis with those specifically named, would be to render the general words meaningless. The particular words "lease" and "contract" exhaust the whole genus of claims that can be made under the leases, but they do not touch claims, titles or rights asserted to the leased property through the recipient of the lease or permit, that are of an equal dignity and character, and are shown to exist and be claimed *through* the lessee by reason of his holding the legal title to an undivided interest that equitably belongs to another, and whose rights, therefore, inure to him through the lease or permit granted. The words "all permits or leases hereunder shall inure to the benefit of the claimant and all persons claiming *through* or under him by lease, contract," when read in connection with the general words "or otherwise," can only mean that a claim such as that made by a cotenant claiming through the identical mining title that is the source of the lease or permit, and the foundation of the lessee's right to receive the same, shall be embraced within the meaning of the general words "or otherwise" following the specific words "lease" and "contract" found in the inuring clause, and must refer to an undivided interest or title held in common with the lessee or permittee in the premises covered by the lease or permit.

Further, the maximum must yield to another salutary rule of construction, viz., that every part of a part of a statute, if possible, be upheld and given its appropriate office. Every word should, when possible, have assigned to it some meaning. In the case at bar, the restriction of the general words used in the inuring clause to such claims or rights as are designated and embraced by the previous specific words would not be giving effect to such general words, but would amount to a rejection of the same as meaningless or surplusage.

**PLAINTIFF IS ENTITLED TO RECOVER ON THE
GROUND OF MISTAKE OF LAW.**

Equity will impress a trust upon the title which the patent represents, where granted under mistake of law by the officers of the Land Department, for the benefit of the person equitably entitled thereto, and by analogy the same trust should be imposed upon the title which the lease represents under the Leasing Act. The parties actually entitled under the law cannot because of its misconstruction or misapplication by those officers be deprived of their rights.

Johnson v. Towsley, 13 Wallace 72, 91
Moore v. Robbins, 96 U. S. 530
Widdecombe v. Childers, 124 U. S. 400
Cornelius v. Kessel, 128 U. S. 456
Sanford v. Sanford, 139 U. S. 642
Monroe Cattle Co. v. Becker, 147 U. S. 47
Garland v. Wynn, 20 How. 6
Lindsey v. Hawes, 2 Black 554
Silver v. Ladd, 7 Wallace 219
Hedrick v. A. T. & S. F. R. Co., 167 U. S. 673
Meador v. Norton, 11 Wallace 442

The deeds given by Cy Iba to Victoria A. D. Johnson and Joseph H. Lobell were misconstrued by the Commissioner and Secretary as passing the title of McManus and his heirs to the grantees. The facts found by the Commissioner are not open to dispute, and the distinct finding as to the passing of the title is that it was conveyed to the defendants' grantors by means of the two deeds above referred to. The execution and delivery of the deeds is the indisputable fact found, but the conclusion of law arrived at by the Commissioner and Secretary that they operated to convey the title to the undivided one-eighth interest of George McManus and his heirs in the O'Glase claim, is the first mistake of law upon which this suit rests. As a conveyance under the power of attorney given to Fales and Iba jointly, (R. 12-13-14.) construed as a naked power of attorney, they pass no title, because executed by only one of the donees of the

power. This was the first mistake of law. But the Commissioner found that the power was a deed of trust in its legal effect. (R. 12.) This was the second mistake of law. The Commissioner then found as a conclusion of law that the power of attorney being a deed of trust, the legal title rested in Iba, and that his deeds to Johnson and Lobell thus passed the entire title in the claim to his grantees. This was the third mistake of law. But the fact is, and was so found by the Commissioner, that this instrument, construed by the Commissioner to be a deed of trust, was given by George McManus to two trustees, Shepherd Fales and Cy Iba. (R. 11.) Therefore, the Commissioner's conclusion as a matter of law that the deeds of Cy Iba, only one of the trustees, to Victoria A. D. Johnson and Joseph H. Lobell, conveyed the entire title and estate in the O'Glase claim to his grantees, is the fourth mistake of law. A deed executed by one of two trustees conveys no title. So, also, a joint authority to sell and convey real property, conferred upon two donees in a power of attorney must be exercised or performed by the agents jointly.

- Wilder v. Ranney, 95 N. Y. 7
- Davidson v. Provost, 35 Ill. App. 126, 129
- Rollins v. Phelps, 5 Minn. 463, 467
- Johnston v. Bingham, 9 Watts & Ser. 56
- Unterberg v. Elder, 211 N. Y. 499
- White v. Davidson, 8 Md. 169, 187
- Sinclair v. Jackson, 8 Cowen 543, 582
- Boon v. Clark, 3 Fed. Cases 1641
- Leab Bro. v. Drakeford, 75 Ala. 464
- Rundle v. Cutting, 18 Colo. 337
- Johnson v. Smith, 21 Conn. 627, 635
- Penn. Ins. Co. v. Bauerle, 143 Ill. 459
- Hartford Ins. Co. v. Wilcox, 57 Ill. 180
- Robbins v. Horgan, 192 Mass. 443
- Flerschman v. Shoemaker, 2 Ohio Cir. Ct. 152
- Reeves v. Ins. Co., 41 South Dakota, 341
- Mechem Agency, 2 Ed. p. 143, Sec. 198
- 21 Ruling Case Law, p. 880
- 2 Corpus Juris, p. 668, Sec. 318
- 31 Cyc., p. 1105

The Commissioner further found that the applicant for lease, the Federal Oil & Development Company, was the holder of the fee title to the O'Glase claim and had surrendered the same to the United States, and therefore the question of the mining title to the land involved was not in issue. (R. 12.) This was the fifth mistake of law. In issuing the oil lease to the Federal Oil & Development Company the Commissioner of the General Land Office and the Secretary of the Interior failed, or refused, to give any force and effect to the inuring clause found in Section 18 of the Minerals Leasing Act of February 25, 1920, and leased the entire acreage of the O'Glase mining claim to the defendant the Federal Oil & Development Company, without any reservations or exceptions whatsoever in favor of a co-owner or cotenant who had been excluded by the applicant in the application for a lease, and thus, in effect, ruled in law that the inuring clause did not apply to and cover and embrace the rights of an excluded co-owner in the mining claim on which an oil lease was applied for and granted to the co-owner applying therefor. This was the sixth mistake of law.

Having made the foregoing essential mistakes of law as to the title held by the applicant for lease, the Secretary's action in granting the lease was necessarily a misapplication and misconstruction of Section 18 of the Leasing Act, which by its terms contemplates and requires that leases shall be granted only to the holder of and upon his relinquishment to the United States of the mining title to the oil placer claim upon which the application for lease is founded.

Burke v. Taylor, 47 L. D. 585

The finding by the Commissioner and the Secretary of the Interior that the location of the O'Glase placer was made "by a group of the Iba locators, namely, M. Iba, H. T. Snively, George McManus, Perry Doan, Martin Ashcraft, Sam Bedsaul and W. F. Ford," (R. 11.) without naming Cy Iba as attorney in fact, or otherwise, is a finding that

the location was made by the named locators individually as an association placer claim, and not through an attorney in fact. This is necessarily so, as the power of attorney construed as a deed of trust by the Commissioner in order to give legal effect to Cy Iba's deeds executed under it, could only be given such a construction and effect, and make it valid in law, by finding as a fact that the O'Glase claim was located by the locators individually. It will never be presumed that a public official in the exercise of a judicial function made or intended to make a finding of fact, upon which his decision must rest, that an act had been done in a manner that was unlawful as being within the prohibition of a statute, and thereby destroy his decision and the rights founded upon such act. The presumption is to the contrary.

It is settled by the authorities heretofore cited that if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, the Land Department has, by a mistake or law, deprived a man of his rights, it will give relief. The facts in the instant case cannot be disputed, nor is there any reasonable doubt as to what the facts are. The Commissioner found as a fact that McManus gave a power of attorney to Cy Iba and Shepherd Fales jointly, containing a clause of conveyance, and as a matter of law he found that this power of attorney constituted a deed of trust, which gave to Cy Iba alone the right to convey the legal title to the claim—a glaring mistake of law. But nowhere does he find that the location of the claim was made by Cy Iba as the donee under the power of attorney or as a trustee under a deed of trust. The finding of the Commissioner is directly to the contrary. It is explicit. He specifically finds that:

“The so-called powers of attorney granted by (to) Cy Iba were deeds of trust by which Cy Iba was authorized to sell and convey such claims as the O'Glase, *after same were located*.” (R. 12.)

A finding that Cy Iba had located the O'Glase claim under the power of attorney as found to have been given to

him by McManus and others, would have invalidated the location and compelled the rejection of the application for a lease made by the defendant the Federal Oil & Development Company, and the granting of the lease itself irresistibly compels the conclusion that the location was made individually as an association placer by the eight persons named in the location certificate. Such is the finding of the Commissioner and such are the allegations of the bill, which are admitted by the motion to dismiss. (R. 2-3.)

The defendant the Federal Oil & Development Company having received the lease as the purported successor of the locators of the O'Glase placer mining claim, cannot now be heard to say, for the purpose of defeating the claim of the successors in interest of one of the locators, that such location was invalid, as they do when they urge that the location was made by an alleged attorney in fact, or trustee in a deed of trust, under an instrument that would bring such a location within the condemnation of Sections 2330 and 2331 of the Revised Statutes. Such an interpretation of the findings of fact of the Land Department on this question will not be indulged by any court.

"When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate if two constructions are fairly possible, to adopt that one which equity would favor, and render the transaction lawful."

Garrard v. Silver Peak Mines, 82 Fed. 586

Johnson v. Towsley, 13 Wallace, 79, is the leading case on this proposition, and as it is an authoritative statement of the law by this Court, we quote fully the statement of facts and law involved in that case, as made by this Court, speaking through Mr. Justice Miller:

"The record before us is brought here by a writ of error to the supreme court of the state of Nebraska, for the purpose of revising a judgment of that court, affirming a decree in chancery of one of the district courts of that state.

"The plaintiff in error, Johnson, having secured from

the United States a patent for eighty acres of land, the subject of this controversy, a suit was brought in the proper courts of Nebraska by Towsley, the defendant in error, to compel a conveyance of the title thus held, on the ground that in equity he was entitled to it, and the Nebraska courts decreed as prayed by him.

"The jurisdiction of this court rests on two grounds found in the 25th section of the judiciary act, or, perhaps we should rather say, in the 2d section of the act of February 5, 1867 (14 Stat. at L. 385), which seems to be a substitute for the 25th section of the act of 1789 (1 Stat. at L. 73) so far as it covers the same ground. The defendant in error relied on his patent, as conclusive of his right to the land, as an authority emanating from the United States, which was decided against him by the state court, and he relied upon certain acts of Congress as making good his title, and the decision of the state courts was against the right and title set up by him under those statutes. Undoubtedly, the case is fairly within one or both of these clauses of the act of 1867, and the conclusiveness of the patent and the right of the plaintiffs in error claimed under the statutes must be considered.

"The contest arises out of rival claims to the right of pre-emption of the land in controversy. The register and receiver, after hearing these claims, decided in favor of Towsley, the complainant, and allowed him to enter the land, received his money, and gave him a patent certificate. On appeal to the Commissioner of the Land Office their action was affirmed, but on a further appeal to the Secretary of the Interior, the action of these officers was reversed on a construction of an act of Congress, in which the Secretary differed from them, and under that decision the patent was issued to Johnson.

"It will be seen by this short statement of the case that the rights asserted by complainant, and recognized and established by the Nebraska courts, were the same which were passed upon by the register and receiver, by the commis-

sioner, and by the Secretary of the Interior, and we are met at the threshold of this investigation with the proposition that the action of the latter officer, terminating in the delivery to the defendant of a patent for the land, is conclusive of the rights of the parties not only in the Land Department, but in the courts and everywhere else.

“This proposition is not a new one in this court in this class of cases, but it is maintained that none of the cases heretofore decided extend, in principle, to the one before us; and the question being pressed upon our attention with an earnestness and fullness of argument which it has not, perhaps, before received, and with reference to statutes not heretofore considered by the court, we deem the occasion an appropriate one to re-examine the whole subject.

“The statutory provision referred to is the 10th section of the act of June 12, 1858 (11 Stat. at L. 326), which declares that the 11th section of the general pre-emption law of 1841 shall ‘be so amended that appeals from the decision of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior.’ * * *

“But while we find no support to the proposition of the counsel for plaintiffs in error in the special provision of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the Land Office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of

the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the Crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the Land Office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing, and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the Land Office. It is very well known that these officers do not confine themselves to determining, before a patent issues, who is entitled to receive it, but they frequently assume the right, long after a patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party, and if the holder of the first patent refuses to surrender it they issue a second. In such a case as this have the courts no jurisdiction? If they have not, who shall decide the conflicting claims to the land? If the land officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights? Such is the case of *Starks v. Starrs*, 6 Wall. 402, in which the

patent was issued to one party one day and to the other the day after for the same land. They are also in the habit of issuing patents to different parties for the same land, containing in each instrument thus issued a reservation of the rights of the other party. How are those rights to be determined except by a court of equity? Which patent shall prevail, and what conclusiveness, or inflexible finality, can be attached to a tribunal whose acts are in their nature so inconclusive? So, also, the register and receiver, to whom the law primarily confides these duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly, this constitutes a vested right, and it can only be divested according to law. In every such case, where the Land Office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, 'a court of equity will,' in the language of this court in the case of *Starks v. Starrs*, just cited, 'convert him into a trustee of the true owner, and compel him to convey the legal title.' In numerous cases this has been announced to be the settled doctrine of this court in reference to the action of the land officers. *Lytle v. Arkansas*, 22 How. 193; 306; *Garland v. Wynn*, 20 How. 8; *Lindsey v. Hawes*, 2 Black, 559.

"Not only has it been found necessary in the interest of justice to hold this doctrine in regard to the decisions of the land officers of the United States, but it has been found equally necessary in the states which have had a system of land sales. Numerous cases are found in the courts of Ken-

tucky and Virginia, where they have, by proceedings in equity, established the junior patent to be the title instead of the elder patent, by an inquiry into the priority of location or some other equitable matter, or have compelled the holder of the title under the patent to convey, in whole or in part, to some persons whose claim rested on matters wholly anterior to the issuing of the patent. There is also a similar course of adjudication in the State of Pennsylvania, and we doubt not cases may be found in other states. Several of the Kentucky cases have come to this court, where the principle has been uniformly upheld. *Finley v. Williams*, 9 Cranch, 164; *McArthur v. Browder*, 4 Wheat. 488; *Hunt v. Wickliffe*, 2 Pet. 201; *Green v. Liler*, 8 Cranch 229.

"It is said, however, that the present case does not come within any of the adjudicated cases on this subject; that in all of them there has been some element of fraud or mistake on which the cases rested.

"Undoubtedly, there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the Land Office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud or impositions or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. And this is precisely what this court decided in the case of *Minnesota v. Bachelder*, 1 Wall. 109, 17 L. ed. 551, and in the case of *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138. In this latter case a certificate under the Oregon donation law, given by the register and receiver, was set aside by the commissioner, and his action approved by the Sec-

retary, and the action of each of these officers was based on a different construction of the act of Congress. This court held that the register and receiver were right; that the certificate conferred a valid claim to the land, and that the patent issued to another party by reason of this mistake must inure to the benefit of the party who had the prior and better right. This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law."

Johnson v. Towsley, 13 Wallace 72

Monroe Cattle Co. v. Becker, 147 U. S. 47

Rector v. Gibbon, 111 U. S. 276

Duluth & Iron Range R. Co. v. Roy, 173 U. S. 587

Bearing in mind that when the defendant the Federal Oil & Development Company applied for and received the oil lease in controversy it was a tenant in common with the heirs of George McManus; that this fact is indisputably shown by the admitted facts in this record; that in law the application for an oil lease made by the defendant cotenant

was also the application of the heirs of George McManus; that the defendant's right to apply for and receive an oil lease on the O'Glase claim was a joint right held by it in common with the heirs of George McManus, undivided and unpartitioned, although not called to the attention of the Land Department by the defendant applicant as required by Section 24½ of the Regulations; that it was impracticable and impossible for the heirs of George McManus to present a claim under a right of property vested in them of which they were wholly ignorant; that the bringing of this action affirms the application for an oil lease made by the cotenant of the heirs of George McManus, and affirms the action of the Land Department in granting the lease to the defendant; that this action seeks only to enforce the plaintiff's title to an undivided interest in the oil lease which was acquired by the defendant the Federal Oil & Development Company by means of the wrongful relinquishment to the United States of the rights of the heirs of George McManus in the placer claim, which is the foundation of the defendants' present title to the premises; and that the heirs of George McManus had exactly the same privity of estate with the United States as had the Federal Oil & Development Company; what was said by Mr. Justice McKenna, speaking for this Court, in the case of *Duluth & Iron Range R. Co. v. Roy*, 173 U. S. 587, 590, is very pertinent to the case at bar:

“It is now too well established to need argument to support or a citation of authorities, that when a patent is obtained from the United States by fraud, mistake, or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will divest or control the title thereby acquired, either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. And in two late cases (*Germania Iron Co. v. United States*, 165 U. S. 379; *Williams v. United States*, 138 U. S. 514, it was decided that

this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

“The plaintiff in error, however, contends that defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove to it, or established, or alleged even in this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

“This contention is attempted to be supported by the principles announced in *Bohall v. Dilla*, 114 U. S. 47; *Sparks v. Pierce*, 115 U. S. 408; *Lee v. Johnson*, 116 U. S. 48. The principles are that to enable one to attack a patent from the government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

“We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; may not have reached it, and yet justify relief, as in *Ard v. Brandon*, 156 U. S. 537, and in *Morrison v. Stalnaker*, 104 U. S. 213. And because of the well-established principle that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. *Lytle v. The State of Arkansas*, 9 How. 333.”

Duluth & Iron Range R. Co. v. Roy, 173 U. S. 590, 591
The plaintiff in this case is nowhere saying or contending that the oil lease should not have been granted to the Fed-

eral Oil & Development Company, but our contention is that the lease having been granted on the application of one of the cotenants of the heirs of George McManus, the rights of those heirs should have been saved or reserved in the oil lease, that the failure and omission of the Land Department to do this does not prevent the cotenants of the lessee from enforcing in this action their undivided interest in the oil lease which is simply the legal title for a term of years in which the undivided title of the O'Glase mining claim has been merged, but not extinguished, and that this case is therefore within the reasoning of this Court in the case of *Duluth & Iron Range R. Co. v. Roy*, *supra*, that by the law properly administered the title of the heirs of George McManus to an undivided interest in the lease should have been either awarded to them, or recognized as inuring to them, by the lease, and that they are entitled to enforce this undivided right and title in the present action. The facts in this case show that at the time of the application for and granting of the lease the heirs of George McManus held a title and estate in common with the defendant the Federal Oil & Development Company in the O'Glase claim, had the same privity of estate with the Government, and were equally entitled to an undivided interest in the lease granted to the defendant.

THE ALLEGATIONS OF THE BILL AS TO MISTAKE
OF LAW ARE SUFFICIENT

The mistakes of law are sufficiently pleaded. All the facts found by the Commissioner necessary to pass the title of George McManus and his heirs to the Federal Oil & Development Company, or its grantors, if the legal conclusions deduced therefrom are correct, are set out in paragraph 20 of the bill, (R. 10-11-12.) and the actual contents of the instruments of conveyance held by the Land Department to have conveyed the title of McManus and his heirs to the applicant, or its grantors, are necessarily and fully set forth in the succeeding paragraphs in a manner that shows that these deeds found as a matter of law by the Commissioner to have conveyed the entire fee title of the O'Glase claim to the applicant's grantors could not and did not have that effect in law.

Marquez v. Frisbie, 101 U. S. 473.

And in paragraph 28 of the bill the mistakes of law made by the Commissioner and confirmed by the Secretary are specifically pointed out. (R. 16-17-18.) The rights of the heirs of George McManus and of the plaintiff under the inuring clause contained in Section 18 of the Oil Leasing Act, are also set up and claimed in Paragraph 34 of the bill (R. 19-20.) and that averment explicitly claims a right under the Act of Congress that has been denied by the Secretary of the Interior, under a mistaken construction of the law. It was the *lack of these specific allegations* of mistake of law by the plaintiff in error in the case last cited that was made the ground for denying relief, the Supreme Court saying that *general allegations* of fraud and mistake are not sufficient.

The defendants attempt to urge that the bill of complaint does not sufficiently plead the mistakes of law. In support of this contention they cite the case of Durango Land & Coal Co. v. Evans, 80 Fed. 425. But this case is not in point as an authority in the instant case. That was an action

assailing the facts found by the Land Department on the ground that the Department had misconstrued the evidence, and that the decision of the Land Department was procured by fraud and imposition. In the bill of complaint in that case no attempt was made to plead the *facts as found by the Land Department*. Mistake of fact induced by fraud and imposition on the Land Department was the cause of action attempted to be pleaded in the bill of complaint, and the allegations were held insufficient in that respect, the court saying:

"If fraud is charged as a ground for annulling a decision of the Land Department, it is not enough that false testimony or forged documents have been employed; but it must be made to appear that such false testimony has affected the decision and led to a result which otherwise would not have been reached. And inasmuch as the findings of the land department on questions of fact are conclusive, when the charge is that the Land Department has erred in the decision of a mixed question of law and fact, what the facts were, as laid before and found by the department, must be shown, so as to enable the court to see clearly that the law has been misconstrued."

In the Durango case the plaintiff weakly attempted to plead a mistake of law. In considering this question the court said:

"A fundamental defect in the bill in this respect is that it fails to set out the evidence which was laid before the Land Department, or to state what the department found the material facts to be, in such a manner that the court can separate the department's findings of fact from its conclusions of law, and see clearly wherein a mistake of law has been made."

In that case the only allegation as to a mistake of law was in the following words:

"That there was *no evidence* before the said Land Department at said hearing or contest showing that the said entry of the said McMaster was unlawful or invalid in any re-

spect, and that there was *no evidence* in said pretended contest upon which the said pretended entry of the said Evans should or could legally have been allowed."

This was obviously a futile attempt to predicate a mistake of law upon the evidence received by the Land Department on the hearing of a contest, and was properly held insufficient, the Circuit Court of Appeals saying:

"These allegations, however, merely state the opinion of the pleader with reference to the *evidence* which was laid before the department, and for that reason they are merely conclusions of law. To enable a court to decide whether the conclusions so stated are right or wrong, all testimony with respect to which the ~~afore~~said opinion is expressed should have been set out, inasmuch as the question whether there is any evidence tending to establish a given fact is a question of law, which can only be determined after all the testimony has been considered and examined."

The principles of law and rules of pleading properly applicable to this class of cases are succinctly stated by Circuit Judge Sanborn in the case of *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 479, as follows:

"The Land Department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land. But the judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and, if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake

of the facts, the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it on either of two grounds: (1) That upon the facts found, conceded, or established without dispute at the hearing before the department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another; or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect. If he would attack the patent on the latter ground, and avoid the department's finding of facts, however, he must allege and prove not only that there was a mistake in the finding, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing."

It hardly needs reiteration that in the present action the mistakes of law are predicated upon the facts found by the Land Department, which are undisputed and admitted, and such facts found by the Land Department are set out in the bill of complaint in this action; and there is no attempt made in this case to predicate the mistakes of law on the ground that the *evidence*, if there was any, given before the Land Department was insufficient or misconstrued by its officers. In short, the plaintiff's cause of action is based upon the ultimate facts found by the Commissioner and Secretary of the Interior, from which facts they deduced the conclusions of law, which we think are clearly shown by the allegations of the bill of complaint, and the authorities cited in support of it, to be erroneous.

"It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation

and knowledge of the points decided, or as to the methods by which he reached his determination."

DeCambra v. Rogers, 189 U. S. 119

THE OIL AND GAS REGULATIONS ADOPTED BY
THE SECRETARY OF THE INTERIOR

The defendants urge that Regulations 24 and 24½, adopted by the Secretary of the Interior to accomplish and carry out the purposes of the Oil Leasing Act (Section 32 of the Act), operate in some occult manner by their own inherent force to extinguish and bar the rights of the heirs of George McManus in the premises in controversy, and the oil lease issued for the same. These Regulations are printed in full in 47 Land Decisions, 437, 487. It is true that Regulations adopted by the Secretary of the Interior to properly carry out and accomplish the purposes of the Oil Leasing Act have the force and effect of law, provided those Regulations are consistent with that law, and do not add to the statute any requirements for the granting of an oil lease that are not within the plain provisions of the Act, or necessarily implied therefrom. But the law does not give the Secretary of the Interior the right, either by a Regulation, or by his construction and application thereof, to superadd a penalty to the law, or impose a forfeiture, for the failure of the owner of a vested right to an undivided interest in a mining claim, whose co-owner and cotenant has made application for a lease, to comply with the provisions of the Regulation.

Work v. Louisiana, decided November 23, 1925
U. S. Supreme Ct. Adv. Ops. Oct. Term, 1925, p. 87
Anderson v. Clune, decided November 16, 1925
U. S. Supreme Ct. Adv. Ops. Oct. Term, 1925, p. 56

The case of *United States v. United Verde Copper Co.*, 196 U. S. 207, was an action brought by the United States against the Copper Company to recover the sum of \$38,976.75, the value of timber cut and removed from certain unsurveyed mineral land in the Territory of Arizona. It was alleged that the timber belonged to the United States, and "was used and consumed by the said defendant for

the purpose of roasting ore at the United Verde Copper mines, said mines being the property of the defendant herein, at Jerome, Yavapi County, Arizona Territory, in violation of the Act of Congress of June 3, 1878, 20 Stat. at L. 88, chap. 150, and of the rules and regulations of the Secretary of the Interior, promulgated under authority of the said Act of Congress."

The statute in question provides "that all citizens of the United States . . . shall be and are hereby authorized and permitted to fell and remove for building, agriculture, mining, *or other domestic purposes*, any timber . . . subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes."

Among the regulations promulgated by the Secretary of the Interior were the following: "4. The use for which the timber may be felled or removed are limited by the wording of the Act to 'building, agriculture, mining, or other domestic purposes.' 7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining."

In that case the Government made the contention that the words, "*or other domestic purposes*," did not give a license to use timber for smelting purposes under the arbitrary construction placed upon them by the Secretary of the Interior by Rule 7, and that the Secretary might give such an authoritative and final construction of the statute, which was in effect an amendment to the statute, by adding thereto a prohibition, and thereby narrowing the natural meaning and import of the general words of the statute. But this Court refused to yield to that contention, and held that the Secretary of the Interior, although having the power expressly delegated to him to prescribe rules and regulations for the protection of the timber on public mineral lands of the United States, could not by his regulations amend an act of Congress by narrowing the meaning

and effect of the statutory language; that the power to abridge the meaning of a statute was also the power to enlarge, and was administrative legislation, and not regulation, this Court, speaking through Mr. Justice McKenna, saying:

"But the government relies on the rules and regulations of the Secretary of the Interior, promulgated under, as it is contended, the authority of the statute since *United States v. Richmond Min. Co.* was decided. No. 7 of those regulations provides that 'no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry, from that of mining.' By this the Secretary of the Interior may have intended to supersede the ruling in *United States v. Richmond Min. Co.*, but to which industry the roasting of ore shall be assigned the Secretary does not say, and the considerations which we have expressed apply as well to the regulation as to the statute. But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. Smelting may be a separate industry from mining, but that does not deprive it of the license given by the statute. As we have already said, the general clause, 'other domestic purposes,' is as much a grant of permission to the industries designated by it to use timber as though they had been especially enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. The industries meant by the general clause may receive indeed limitation from those enumerated; in other words, be limited to the conditions existing in the mining states and territories when the statute was enacted; but there can be no doubt that smelting has such relation. If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation: It is legislation. The power of legislation

was certainly not intended to be conferred upon the Secretary."

U. S. v. United Verde Copper Co., 196 U.S. 214, 215

Also in the case of United States v. George, 228 U. S. 14, this Court said:

"Acting under the authority presumed to be given by Sec. 2246 and the other sections, a regulation was promulgated which prescribed forms of taking pre-emption and final homestead proof by questions and answers, and provided that 'the claimant will be required to testify, as a witness, in his own behalf, in the same manner.' It was testimony exacted in pursuance of this regulation and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; Sec. 2291 requires two only, and, as we have said, points out what proof, in addition, the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by Sec. 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Sec. 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all, it is as broad as its subject, and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute."

United States v. George, 228 U. S. 20, 21

United States v. Eaton, 144 U. S. 677, 687

The defendants' contention under the Regulations is,

that every tenant in common of an association oil placer claim is bound to make an application for a lease if any one of the cotenants makes and does not join all his cotenants as joint applicants; that any co-owner and cotenant who does *not* make an application for the common premises thereby loses all right, title, and interest in the entire claim held by them under a common, undivided title at the time of the application for a lease. This, the defendants claim, is the legal effect of the Regulations adopted by the Secretary under the authority of Section 32 of the Leasing Act. The Regulations the defendants invoke are numbered 24, 24½, 27 and 28. The principal contention is made under Regulation 24½, and we may digress here long enough to say that the fractional number of this Regulation shows palpably that it is an official afterthought. This Regulation in substance provides that *all* the co-owners of a mining claim must make application, or join, or be joined, in an application for a lease, and, by implication, if such application be not made by all, the rights of those not applying individually or jointly, will not be considered by the Interior Department in granting a lease or permit. And the construction placed upon this Regulation 24½ is that upon the application of one co-owner *claiming* the entire title, the Department will consider the rights of the other co-owners of the common property as being *waived* by their failure to apply for a lease, and will issue a lease or permit to the applicant for the whole of the mining claim in which he actually owns only an undivided interest. See, C. D. Murane, 48 L. D. 526. These deductions are arrived at by Regulations 27 and 28, providing for the giving of notice of the application for a lease, and a hearing at the option and discretion of the Commissioner of the General Land Office and Secretary of the Interior, and the legal results that the defendants say are deducible from the Regulations, the notice of application, and the application for a lease by one of the tenants in common of a mining claim to the exclusion of his co-owners, is that *ipso*

facto, a new, distinct, independent, and adverse title to the premises theretofore owned in common, has been created, having *no relation* to the valid and existing title and estate in real property upon which this new legal title is founded and in which it had its inception. Thus valid and vested estates in real property can be totally destroyed; (1) by the fiat of an administrative officer, i. e. the Regulations (which to be valid must be consistent with the statute and Constitution), and, (2) by the election of one tenant in common to assert title to the common property to the exclusion of his cotenants by means of constructive notice given for thirty days, and thereby procure the issuance of an oil lease that it is claimed is of such potent effect as to deprive all the other co-owners of the property, who are also in privity with the United States, but who are not named in the instrument, of all their rights and interests in property to which they had a vested title prior to the giving of a thirty day notice by a cotenant that he would apply for a lease on the common property from the United States. All, as asserted by the defendant, because the other co-owners did not apply for a lease, or did . . . contest the application of their cotenant. But the statute does not say that the title of a cotenant is thereby lost, the Regulations do not say it, and there is no decision of any court, that has any support in law, that sanctions the depriving a person of his property without a recourse to the courts, in the manner contended for by the defendants.

Section 2325 of the Revised Statutes provides for the publication of the notice of an application for patent to a mining claim, and also the posting of such notice on the claim, but that statute and the notice published and posted pursuant to it has never been held to destroy the title of a co-owner of the claim, who was not joined in the application, and did not protest, or contest, the application, and never appeared in the proceedings. All the courts have decided that the co-owners of a mining claim are cotenants; that the application of one cotenant for a patent is the

application of the application of all his cotenants, and inures to their benefit; that the patent when issued on such an application inures to the benefit of the excluded cotenants; and that the cotenant and co-owner receiving the patent holds the undivided interest of his excluded cotenants in the title in trust for them. A patent is the highest evidence of title granted by the Government to a mining claim. That title has its inception in and relates back to the acts of discovery, location, and keeping up, of the mining claim for which it is issued. It does not confer a title, but confirms a title, to a mining claim that prior to the issuance of the patent was the property of the locator or his successor in interest.

Heydenfeldt v. Daney Min. Co., 93 U. S. 634, 641

Deffeback v. Hawke, 115 U. S. 392, 405

Davis v. Weibbold, 139 U. S. 507, 530

Van Sice v. Ibex Min. Co., 173 Fed. 895 (8th C.C.A.)

An oil lease issued for an oil placer mining claim is in no wise different from a mining patent, except that instead of conveying an absolute fee as does a patent, it conveys only a limited estate, towit, an estate for years. This limited estate for years is subject to the same rules of law and principles of equity that govern the transfer of an estate in fee simple in exactly the same kind and class of property. The same doctrines apply to it, the same reasons for applying the established doctrines of equity, as applied by the courts to the conveyance of a fee simple title by a mining patent, exist for applying those principles to an oil lease issued under the Oil Leasing Act. But, say the counsel for the defendant, all this has been overthrown by the Regulations adopted by the Secretary of the Interior, and the construction placed upon those Regulations by the Department, which is, that any co-owner of a valid and subsisting placer mining claim is deemed to have waived his rights and is forever barred from afterwards asserting them if he fails to apply personally for a lease within six months after February 25, 1920, or does not protest or con-

test the application of a faithless cotenant who has applied for a lease and excluded his cotenant from such application. If the defendant's contention in this case is correct, it would mean that the Secretary of the Interior and the Land Department have a power possessed by no other officer, administrative body or tribunal under our government. But the Secretary of the Interior has not, and cannot have any vested discretion or power to overthrow the legal and constitutional rights of a claimant to the public domain, or to nullify the Constitution.

Daniels v. Wagner, 237 U. S. 547
 Williamson v. U. S., 207 U. S. 461, 462
 Weyerhaeuser v. Hoyt, 219 U. S. 380
 Morrill v. Jones, 106 U. S. 466

DIVISION TWO

THE UNITED STATES IS NOT AN INDISPENSABLE PARTY TO THIS ACTION.

The alleged defense that the United States is an indispensable party to this action, was raised by the defendants in this case, reported in 5 F. (2d) 442-446, but the two District Judges, who constituted a majority of the court, refused specifically to consider this point raised by the defendants. See concluding paragraph of majority opinion on page 446 of 5 Federal Reporter, 2d Series. That point, however, was fully considered by Circuit Judge Stone in his dissenting opinion in this case, and is found on page 448 of the 5 Federal Reporter, 2d Series, commencing on the second column of said page. The only judicial opinion considering this question, in a contest directly involving a lease granted by the United States under the Oil Leasing Act of February 25, 1920, is that found in the masterly exposition of Circuit Judge Stone in this case, above referred to, and we can do nothing better than quote it here in full:

"1. Logically the first ground for attack upon the bill which should be considered is whether there is an absence of necessary parties. It is strongly urged that the United States is an indispensable party because section 30 of the Oil Leasing Act (Comp. St. Ann. Supp. 1923, Sec. 4640¹/₄₀₀) provides 'that no lease issued under the authority of this act shall be assigned or sublet, except with the consent of the Secretary of the Interior,' and that an assignment of an undivided one-eighth interest in the lease is prayed for in the bill. It is most probable that the matter primarily intended to be covered by this statutory provision was a voluntary change by the lessee of his relations to the lease through assignment or subleasing. However, the situation is not similar to that where a patent has been issued to public lands and the dispute arises between the patentee

and some one else as to the right to the land and patent. In the latter case, the government has parted with all interest in its property and is not further concerned, in a proprietary sense, in the ownership. The contest is purely between private parties and it in no way affects the government how that contest may terminate. In the matter of oil leasing under this act, however, there is another situation. Here the government has not parted with its property. It has merely contracted away a right of exploitation for a limited period, this exploitation to be done (according to the terms of section 32 of the act) under necessary and proper rules and regulations safeguarding the interest of the government and securing the performance of the contract. The act gives a preference in application for leases to those having existing placer claim rights to the land in question; but even such preferred persons cannot secure such leases and the benefit of the act unless and until they comply with the "necessary and proper rules and regulations" authorized by section 32 of the act."

"While the courts may decide who is entitled to preference (as placer claim locators) under the act and may correct the department where its decisions in that respect are erroneous in matters of law, yet the person thus found to be entitled to this preference is in no better position than if his right had been freely recognized by the department in the first place. He must still qualify, under such department rules and regulations, before he can occupy the status and secure the benefits of a lessee. While not advised in this regard as to what regulations, if any, the department had or has in force governing these leases, yet the power and authority given by the act to prescribe such and the direct requirement, in the act itself, that no assignment shall be made without the consent of the department clearly evinces the legislative concern in the control by the department of these leases and the operation under them so that the public rights may be safeguarded and enforced. On the other hand, it may be said, section 18 provides that

'all leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject, however, to the same limitation as to area and acreage as is provided for claimant in this section.' The words 'or otherwise' in the above quotation would seem broad enough to cover a claim that the lessor was a trustee. This matter is not free from doubt, but I am inclined to think that the fact that the interest claimed by appellant is an undivided interest in minerals in place is a material and, possibly, a determinative consideration. If the appellant is, as he alleges, a tenant in common in such property, the right would exist, if the property were privately owned, in any tenant to exploit it, provided he accounted to his cotenants for their shares of the net results. It would be possible legally to segregate and divide the undivided interest in such property when and in so far as mined. If the property involved, instead of being privately owned, is a part of the public domain which can be exploited only as allowed by law, and if one of the cotenants has secured this exclusive right to exploitation it would seem that an accounting for the net results would not in any wise affect the lessee or the government in its relation thereto and that a lease of this character would, in its very nature, be indivisible and therefore unassignable in part."

"If appellant, as a cotenant, wished to exploit his property, he might or might not be able to obtain a lease to do so. But if it were possible for him to so operate and his one-eighth interest were freely recognized, he would yet have to account for seven-eighths of his net results from production just the same as he is now asking appellees to account for and recognize his right to one-eighth of their net production."

"Appellant's prayer is clearly in the alternative and intended to cover situations both of a trust relation and of a cotenant relation. My judgment is that his allegations, if establishing a cotenancy in the placer mining claim, could

result only in establishment of a trust relation as to this lease. If this be true, and the result of that relation is solely that appellees shall account to him for one-eighth of the net results of operations under the lease, I do not see how the government is interested or affected by this controversy. Therefore, I think the United States is not a necessary party."

Hodgson v. Fed. O. & D. Co. et al, 5 F. (2d) 448, 449

This court has in a recent decision laid down the same rule and announced the same principles in the case of *Work v. Louisiana*, decided by this Court on November 23, 1925, L. ed. U. S. Adv. Ops. October Term, 1925, p. 87.

The instant case is not one to establish a title against the United States for land that is still within the jurisdiction of the Land Department, as in *Louisiana v. Garfield*, 211 U. S. 70, 76, and *New Mexico v. Lane*, 243 U. S. 52, which were actions to establish the title of the States, before that title had passed from the United States. Nor is it an action to quiet title before a patent has issued, and while the lands in controversy are still in the course of administration in the Land Department which, until patent issues, has exclusive control of proceedings to acquire the title, as in *Minnesota v. Lane*, 247 U. S. 243. In the instant case it is only sought to impress a trust in land the title to which has passed from the United States and is no longer within the jurisdiction of the Land Department, and, as said by this Court in *Minnesota v. Lane*, supra, "the remedy must be sought in the courts after the issuance of patent," or, in the case at bar, its legal equivalent, an oil lease, subject to all the terms, covenants and conditions of said lease, and after the payment of royalty reserved to the United States. (R. 21-22.)

In addition to the foregoing statement of the law properly applicable to this branch of the case, we offer the following views and authorities:

"An 'indispensable party' is one who has such an interest in the subject matter of a controversy that a final decree

between the parties before the court cannot be made without injuriously affecting his interest or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree between them, is a proper party."

Daniels v. Wagner, 237 U. S. 547, 567

Waterman v. Canal Bank, 215 U. S. 33

O'Neil v. Wolcott Min. Co., 174 Fed. 527

Williams v. Bankhead, 19 Wall. 563

Payne v. Central P. R. Co., 255 U. S. 228

Sloan Ship. Corp. v. U. S. Ship. Bd., 258 U. S. 549

The lessor is not an indispensable party to an action brought by a third party against the lessor's tenant for the recovery of the possession of lands, for damages for unlawfully withholding them, and for rents and profits, the land being in the visible and actual occupation of the tenant and not otherwise in the possession of his landlord than by force of his tenancy.

Phelps v. Oaks, 117 U. S. 236

"Where there are outstanding two titles to the same land held by different parties adversely to the real owner, the latter may bring a suit against either to divest him of his title without joining the other; a court of equity has jurisdiction to divest either one of the adverse holders of his title in a separate action."

Williams v. United States, 138 U. S. 514

The United States is not indispensable as a party defendant in this action, for the reason, that it has no such interest in the controversy or the subject matter of the controversy that a final decree between the parties before the Court cannot be made without injuriously affecting its interests, or that a final decree herein will leave the con-

troversy in such a situation as may be inconsistent with equity and good conscience.

Donovan v. Campion, 85 Fed. 71 (8th CCA)

As in the last named case, the United States was a "conduit" through which the title of McManus passed to the defendant lessee and the entire matter can be finally determined consistently with equity between the real parties in interest which are now before the Court.

Distinction must be made in the cases wherein the United States was held to be the real party in interest although not a party to the record, and the case at bar. Most of those cases, cited below, were against officers of the Government who had no personal interest in the subject of the action and where the possession and property of funds of the United States was assailed, and the relief asked and judgment rendered would operate directly upon the possession, property or funds of the United States. Such cases are:

Louisiana v. McAdoo, 234 U. S. 627

Oregon v. Hitchcock, 202 U. S. 60

Minnesota v. Hitchcock, 185 U. S. 373

Re Ayers, 123 U. S. 443

Kansas v. U. S., 204 U. S. 331

Stanley v. Schwalby, 162 U. S. 255

Westbrook v. Director, 263 Fed. 213

Naganah v. Hitchcock, 202 U. S. 473

Wells v. Roper, 246 U. S. 335

Louisiana v. Garfield, 211 U. S. 70

New Mexico v. Lane, 243 U. S. 52

Goldberg v. Daniels, 231 U. S. 218

In this case the United States has granted and conveyed an estate for years, by lease; under the lease as granted, the lessee was granted and leased the possession of the premises described in the lease for twenty years. The reversion being in the United States with right of cancellation for condition broken after appropriate proceedings in the proper United States District Court. Assertion of rights in the possession under the leasehold would not affect the reversion in the United States, as it would be the possession

of the lessee and modes of its enjoyment under the lease that would be affected by any judgment that might be rendered. The relief sought by the complaint is that the defendants be decreed to be trustees for the plaintiff of an undivided one-eighth interest in the oil produced after the payment of all royalties reserved to the United States. (R. 21-22.)

Tiedeman Real Property, SS. 172, 176
 Williams v. U. S., 138 U. S. 514
 Bentley v. Newton, 9 Ohio St. 489, 494
 Lindlay v. Raydure, 239 Fed. 933
 Allegheny Oil Co. v. Snyder, 106 Fed. 764, 766
 Phelps v. Oaks, 117 U. S. 236

A lease is a conveyance, the transfer of a lesser estate.

Blackstone Vol. 2, p. 317
 Tiffany, Landlord & Tenant, Vol. 1, p. 161, 162
 Carlton v. Williams, 77 Cal. 89
 McKee v. Howe, 17 Colorado, 538
 N. Y. C. Ry. Co. v. Randall, 26 N. E. 122 (Ind.)
 Craig v. Summers, 47 Minn. 189
 Tuoy's Estate, 23 Montana, 305
 Averill v. Taylor, 8 N. Y. 44
 Harris v. Oil Co., 57 Ohio, 129

A reversioner has no right of possession during the continuance of the preceding estate.

Neeley v. Martin, 189 S. W. 182
 Doherty v. Russell, 101 Atl. 305
 Lane v. Thompson, 43 N. H. 320

"An estate in reversion is the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted out by him."

21 Corpus Juris, p. 1016, Sec. 179

Lands of the United States may be disposed of and alienated by patents or otherwise.

Wright v. Morgan, 191 U. S. 55, 58

"They may be leased, sold or given away upon such terms and conditions as the public interests require. Instead of granting fee simple titles with exemption from certain debts long leases might have been made or conditional titles bestowed."

Ruddy v. Rossi, 248 U. S. 104-106

The doctrine of *Burke v. Taylor*, 47 L. D. 585, and Regulations 24, clearly indicate that resort to the Courts for the establishment of rights in leases granted under the Act of Feb. 20th, 1920, is not considered an interference with the property or possession of the United States.

An oil and gas lease passes to the lessee a "freehold interest" or a "vested freehold right."

Texas Co. v. Daugherty, 107 Tex. 226

Guffey v. Smith, 237 U. S. 101

Aggers v. Shaffer, 256 Fed. 648 (8th CCA)

"The right of a lessee is the same as a purchaser in fee."

Waskey v. Chambers, 224 U. S. 564

On effect of a lease see:

Sanborn, J. in *Kemmerer v. Midl'd Co.*, 229 Fed. 872, 879

Nor is the United States an indispensable party because of the provision of Section 30 of the Leasing Act which provides that no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior, for the reason, that an involuntary alienation or transfer by operation of law is not a breach of this restriction.

Re Bush, 126 Fed. 878, 879

Gazley v. Williams, 210 U. S. 41

Re Prudential Litho Co., 270 Fed. 469

Re Prudential Litho Co. 265 Fed. 869

Citizens Co. v. Floerscheimer, (Wis.) 177 N.W. 905

Bemis v. Wilder, 100 Mass. 446, 447

Tiffany, Landl. & Tenant, p. 929, Sec. 152, p. 930

2 Tiffany, Real Property, c. c. 21-30

Farnum v. Hefner, 92 Cal. 542, 79 Cal. 580

Dunlop v. Mulery, 83 N. Y. Supp. 477, 1104

The lease in this case provides against the voluntary assignment or subletting of the leased premises, except with the consent of the Secretary of the Interior first had and obtained. No provision is made against assignments by operation of law on proceedings in invitum, and the presence of the "inuring" clause in the Leasing Act is a plain indication that such assignments were not intended to be provided against thereby.

THE RIGHTS OF CO-OWNERS AND TENANTS IN COMMON OF AN ASSOCIATION OIL PLACER MINING CLAIM WHO HAVE BEEN EXCLUDED FROM AN APPLICATION FOR AN OIL LEASE MADE BY ONE OF THEIR COTENANTS AND CO-OWNERS WITHIN THE SIX MONTHS PRESCRIBED BY SECTION 18 OF THE MINERALS LEASING ACT OF FEBRUARY 25, 1920, ARE NOT BARRED BY THAT ACT, AND THE RIGHTS OF THE HEIRS OF GEORGE McMANUS AND THE PLAINTIFF IN THE OIL LEASE IN CONTROVERSY IN THE INSTANT CASE, ARE NOT WITHIN THE PURVIEW AND MEANING OF THE SIX MONTHS LIMITATION CONTAINED IN THE MINERALS LEASING ACT, AND ARE NOT BARRED BY THAT CLAUSE.

This case necessitates the construction and application of Section 18 of the Leasing Act of February 25, 1920, and also the Executive Order of Withdrawal of September 27, 1909, and the Order of Withdrawal of July 2, 1910.

The material portions of Section 18 of said Act applicable to the present controversy, read as follows:

“Section 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive Order of Withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or

gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant, prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of 20 years, at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost. * * * All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear. * * * "

The following are the Orders of Withdrawal, omitting the description of the lands not pertinent to this action.

"WITHDRAWAL ORDER OF SEPTEMBER 27, 1909.

September 27, 1909.

The Honorable,

The Secretary of the Interior.

Sir:

In accordance with your orders I have the honor to submit the following recommendation which covers approximately 3,041,000 acres of which the larger part is probably private land and not affected by this withdrawal."

"TEMPORARY PETROLEUM WITHDRAWAL NO. 5

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

WYOMING

Township 40 North, Range 79 West, Sixth Principal Meridian.

Very respectfully,

H. C. Rizer, Acting Director.

Approved September 27, 1909, and sent to General Land Office.

Frank Pierce, Acting Secretary.

WITHDRAWAL ORDER OF JULY 2, 1910 (WYOMING)

July 1, 1910.

The Honorable,

The Secretary of the Interior.

Sir:

In accordance with your instructions I recommend the withdrawal for classification and in aid of legislation affecting the use and disposition of petroleum deposits belonging to the United States of the following areas in the State of Wyoming, involving approximately 255,461 acres:

ORDER OF WITHDRAWAL, PETROLEUM RESERVE
No. 8

Township 40 North, Range 79 W.;

Secs. 10 to 15, inclusive;

Very respectfully,

Geo. Otis Smith, Director."

"July 1, 1910.

Respectfully referred to the President with recommendation that same be approved.

R. A. Ballinger, Secretary.

Approved July 2, 1910, and referred to the Secretary of the Interior.

Wm. H. Taft, President.

Referred to the Commissioner of the General Land Office for appropriate action.

Frank Pierce, Acting Secretary."

The foregoing Executive Orders of Withdrawal show that after September 27, 1909, *and until July 2, 1910*, all locations or claims existing and valid on September 27, 1909, might proceed to entry in the usual manner after field investigation and examination. This was the exception made in the Withdrawal Order of September 27, 1909, applying to 3,041,000 acres of land in Wyoming and other states. But on July 2, 1910, the Supplemental Executive Order of Withdrawal was issued, solely applicable to the State of Wyoming, and covering all land situated and embraced within the limits of the Salt Creek oil field in the State of Wyoming, including the quarter section in controversy in this action, which wholly withdrew all that land from any further selection, filing, entry or disposal under the mineral or non-mineral public land laws, in aid of pending legislation affecting the use and disposition of petroleum deposits in such lands; and, since the promulgation of the said Supplemental Order of Withdrawal of July 2, 1910, the Department of the Interior has uniformly refused to entertain an application for patent on any lands embraced within the area of the Supplemental Order, construing it to exclude from further entry valid and subsisting unpatented oil placer mining claims, included within its limits; and all applications for patents on oil lands situated within that area, and there were many of them, made in the interim between July 2, 1910, and February 25, 1920, were all immediately adversed by the United States, as in the instant case, (R. 10-11.) under the provisions of Section 2326 of the Revised Statutes of the United States.

In substance, the propositions urged by the defendants on this branch of the case, are reducible to this: That the six months limitation applies to co-owners and tenants in common of a mining claim holding and claiming under the same location and title as a co-owner and cotenant who has applied for and obtained a lease for the whole of the common property, after excluding his co-owners and cotenants from such application and lease, and is an absolute bar to

the enforcement of their equitable rights in the premises in a proper action in a court of competent jurisdiction, after the issuance of the lease. This position of the defendants finds no support in the text of the statute, nor is such a prohibition within its literal language. The decision of the Secretary of the Interior is not made final by the statute, nor is there any negative provision in the statute which expressly or by necessary implication makes the action of the Secretary of the Interior in granting an oil lease a final adjudication of the rights of co-owners and cotenants of the mining claim and location upon which the oil lease is issued. The literal words of the statute are not in themselves susceptible of such a construction, unless a new clause should be read into the statute. The error involved lies in assuming, as the defendants do, that the statute applies to controversies between the owners of a common title *inter se* after the issuance of the lease. This contention, as made by the defendants, when carried to its final analysis, would result in giving the Land Department jurisdiction to decree partition of an association oil placer mining claim of 160 acres in all cases where more than one co-owner applies for a lease, something no court in the United States, though clothed with all the comprehensive powers of a court of equity, has ever essayed to do, as the very nature of the property, and the estate of cotenants therein, precludes and makes impossible an equitable partition of the ground between cotenants into separate tracts or parcels. But all the courts have sustained their own power to compel the recognition of the title of an excluded co-owner and cotenant to his undivided interest in a mining claim after patent has issued to one of the co-owners.

It is a settled rule of construction that statutes are in *pari materia* which relate to the same person or thing. It is a phrase applicable to the public statutes, or general laws, made at different times, and in reference to the same subject. Under this accepted definition, each section of the Oil Leasing Act is in *pari materia* with the others, and that the

Minerals Leasing Act of February 25, 1920, is an amendment of the existing mining statutes of the United States referring to placer and other mining claims, is indisputably shown, not only by the subject matter and body of the Act, but also by the preamble and first section thereof, in which it is stated that it is, "An Act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain," and, "That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States . . . shall be subject to disposition in the form and manner provided by this Act to citizens of the United States . . ." The Act is therefore in pari materia with the existing mining statutes, and thus the Oil Leasing Act must be construed in the light of the present existing law, in the construction and application of the statute to the rights of the owners of existing oil placer mining claims.

Section 18 of the Act permits the granting of oil leases to persons whose locations *post-date* the Executive Withdrawal Order of September 27, 1909, subject to certain conditions, among which are: That one or more oil wells have been drilled or sunk by the claimants on the tracts applied for; that the claimant must pay the United States one-eighth of all the net oil or gas produced from such claims *prior* to February 25, 1920; that the claimant's possession of the land was "undisputed" by any other claimant on July 1, 1919.

To these conditions was superadded the provision that the applications under Section 18 should be filed within six months from the date of the approval of the Act and relinquishment made within like time to the United States of all pre-existing interests of the claimants.

Prior to the passage of the Oil Leasing Act of February 25, 1920, a person who had entered upon and located an oil placer claim on lands of the United States, that had been previously lawfully withdrawn from entry and location, was clothed with no character of lawful right, title or in-

terest, possessory or otherwise, as against the United States. As to the latter, he was a mere naked trespasser.

And Section 37 of the Act expressly provides that oil lands so located "shall be subject to disposition only in the form and manner provided in this Act." But the section continues—

"—*Valid claims* existent at the date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

This section, indeed the entire context of the Act, evinces the unmistakable purpose of Congress to draw a clear distinction between oil claims initiated *after* executive withdrawal and those located *before* such withdrawal, when the latter's locations were valid and subsisting at the date of the promulgation of the Executive Order.

All valid existing mineral locations were recognized and protected by the express terms of the withdrawal proclamation and subsequent congressional legislation likewise confirms the force and effect of such previous valid locations.

The Oil Leasing Act of February 25, 1920, and all previous statutes *in pari materia*, preserve intact the title, right of possession, enjoyment and use of and by the locators, of all valid located oil claims existing at the date of such order; and where discoveries of oil had been made on such claims, and such locations had not been subsequently abandoned or defeated by operation of law, the locators and their privies in interest had the *option* after the passage of the Oil Leasing Act of February 25, 1920, to either apply for a lease under its provisions, or continue in possession of the claims and extract and sell oil therefrom, under the provisions of the placer mining laws of the United States, without the payment of any royalty to the United States.

A claimant who had a valid subsisting location prior to the withdrawal order upon lands embraced within such order, and whose claims remained, in law, intact up to the date of the passage of the Oil Leasing Act of February 25,

1920, and upon which location discovery of oil had been made, which we contend is true, and alleged to be the fact in the bill of complaint, as to the original location of the O'Glase oil placer mining claim made in 1887, would be entitled to a patent from the United States wholly independently of anything contained in said Act. A claimant, who, in law, was entitled to a patent might, if he saw fit, apply for a lease under Section 18, and if a lease was issued to and accepted by him he would thereby waive his right to a patent.

If the query be propounded, Why should the claimant who might be entitled to a patent for an oil claim ever apply for a 20-year lease requiring the payment of a minimum royalty of 12½ per cent to the United States? It may be answered, If there were no adverse or conflicting claims, it would be unlikely that in such case a lease would be *applied* for, and yet it is palpable that Congress has extended to such character of claimant the privilege of applying for a lease instead of a patent if he sees proper so to do.

Under the Oil Leasing Act of 1920 an individual may obtain a lease by summary application without cumbersome proceedings, and at a nominal expense, while if a patent was applied for and adversed, judicial proceedings would be necessary, involving long delay and possibly ruinous expense in conducting the litigation. In case of conflicting claims, the owner of the superior title might prefer to apply for a lease and avoid the delay and expense incident to patent proceedings, and obtain a speedy summary adjudication upon the conflicting claims, culminating in the issuance of a lease to him.

If the question then be asked: "To what claimants and to what lands does the especial limitation of six months apply, and for whose protection was the limitation adopted?" Our answer is: In view of the mining statutes of the United States, of which this Act is a part, and the decisions of the federal and state courts construing and applying those statutes, that we have heretofore cited in

this brief, and the equitable principles and doctrines applied and initiated in those decisions, we think it shows:

(a) That the limitation of six months in Section 18 of the Act does not apply to valid and subsisting mining claims upon which a valid discovery had been made prior to the Withdrawal Order of September 27, 1909, whose owner or owners desired to avail themselves of Section 18 of the Act.

(b) That the six months clause in Section 18 is a limitation in favor of the United States, and does not apply to the cotenants and co-owners of an oil placer mining claim, where an application for an oil lease has been made by one of such cotenants and co-owners for the whole of the mining claim, without joining therein the other cotenants and co-owners, and has obtained a lease for the entire acreage, based upon the joint location.

(c) That the excluded cotenants and co-owners are not barred by any words of the statute, or by any meaning that can be given to them under any construction within the rules of reason, from asserting in the courts their right and title to their undivided interest in the premises against their faithless and overreaching cotenant who has obtained the legal title from their common grantor, the United States, and excludes them from any participation or benefit in the lease he has thus obtained.

That the six months limitation in which to apply for a lease under Section 18 of the Act, does not apply to an action to enforce an interest in the lease after its issuance, and the reason therefor, is succinctly stated by Circuit Judge Stone, in his dissenting opinion in this case, found in 5 F. (2d) 449, as follows:

"It is also claimed that the cause of action is barred by the limitation contained in Section 18 of the Oil Leasing Act, wherein it is provided that such placer claimants may 'upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this act, of all right, title and interest . . . be entitled

to a lease thereon . . . ' The claim is that as neither appellant nor his predecessor made any assertion of their rights within the above six-months period, they are barred from any participation or interest in the lease or its proceeds. I think that such is not the meaning of the statute. If appellant were seeking to obtain a lease from the government he might well be barred by this language; but what he is asking is not something additional from the government but to have declared and enforced an interest, which he claims to have, in a lease granted by the government within the six-months period. The purpose of the above limitation seems to be to fix a period within which those claiming existing placer mining rights may assert them and establish their preference to leases over others who might want to apply for permits, under this statute, to explore land on the public domain."

Hodgson v. Fed. Oil & Dev. Co., 5 F. (2d) 449

This case was decided by the Circuit Court of Appeals on March 28, 1925, in an opinion by District Judges Munger and Miller, holding that the action was barred by the six months limitation found in Section 18 of the Oil Leasing Act, and they specifically refused to consider or decide any other question in the case. (R. 55.) Circuit Judge Stone, also a member of the court that decided the case, filed a dissenting opinion, covering all questions raised in the case, which is found on pages 446-450 of the 5 Federal Reporter, 2d Series. The prevailing opinion of District Judges Miller and Munger in the Circuit Court of Appeals, after reciting in substance the allegations of the bill of complaint, and quoting the applicable portions of section 18 of the Oil Leasing Act of February 25, 1920, section 32 of that Act, and section 24½ of the Regulations of the Secretary of the Interior adopted to carry out and accomplish the purposes of the Oil Leasing Act, is, *haec verba*, as follows:

"(1) It therefore appears that before appellant or his predecessors in interest would be entitled to any lease from the government for any interest in said premises, he or they

must, within six months after February 25, 1920, have relinquished to the United States all their right, title, and interest claimed or possessed prior to July 3, 1920, and continuously since by such applicant or his predecessors in interest under the pre-existing mining law to any oil or gas bearing land embraced in the executive order of withdrawal of September 27, 1909, and have paid to the United States as royalty an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced. Neither compliance or attempted compliance with such conditions or alleged or pretended but the bill expressly negatives such facts. It is, however, alleged in the bill that appellant's grantors were without actual knowledge of the provisions of section 18 of the Leasing Act until February 11, 1922, and appellant argues that such lack of actual knowledge in some equitable manner operated to suspend the six months limitation provided for in said act. We think a sufficient answer thereto is that the statute makes no such exception; but see *Madden v. Lancaster County*, 65 F. 188, 194-195, 12 C. C. A. 566; *U. S. v. Missouri Pacific Ry. Co.*, 213 F. 169-173, 130 C. C. A. 5.

“(2) The question then under the third ground of the motions is narrowed to whether the appellant may impose a trust on a leasehold that neither he nor his grantors at any time were or now are entitled to receive, or any part thereof, from the lessor. We think the law on this question is well settled. The rule is aptly stated in *Anieker v. Gunsburg and Others*, 246 U. S. 110, 38 S. Ct. 228, 62 L. Ed. 603, where it is said:

‘In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary.’

“See, also, *Duluth & Iron Range Railroad Co. v. Roy*, 173

U. S. 587, 19 S. Ct. 549, 43 L. Ed. 820; Bohall v. Dilla, 114 U. S. 47, 5 S. Ct. 782, 29 L. Ed. 61.

"Because the bill fails to allege compliance or an attempt to comply with the requirements of Section 18 of the Act of Congress approved February 25, 1920, it does not state a cause of action in equity, and therefore was properly dismissed for want of equity under the third ground of the motions to dismiss. That being true, other questions raised and argued do not require our consideration.

"The order of the lower court is affirmed."

The majority opinion in this case announced a principle that has never before been applied by any of the courts to a cotenancy case such as the instant case is. It applies the rules laid down by various decisions of this court applying to contests between the holders of adverse, different, independent and hostile titles, for the same tract of land, such as contests between rival preemption claimants, rival homestead claimants, contests between homestead entrymen and railroad land grants, cases of leases from Indians on Indian allotments, townsite and desert land act cases, between whom no fiduciary relation, or relation of cotenancy, or relation of trust and confidence existed, in actions which sought to compel the holder of the legal title he had obtained from the United States to transfer the entire title and tract of land thus obtained to the claimant of an adverse and different title, distinct and hostile in its inception, who had failed to connect his claim with any title deraigned from the United States, and *who was not in privity with the United States*, to an entirely different class of actions involving a contest between two co-owners and cotenants concerning an undivided interest in the same tract of land, held under the same title, an association oil placer mining claim, held under the same grantor, the United States, and the object of which action was to have a trust declared in the common property and the legal title thereto procured and held by one of the cotenants from the United States, for the benefit of and to the extent of the undivided interest in the prop-

erty and title equitably owned by the other cotenant. The majority opinion of the Circuit Court of Appeals in this case distinctly holds that all the co-owners and cotenants of a valid and subsisting association oil placer mining claim in existence before the passage of the Oil Leasing Act, and before the promulgation of the first Executive Order of Withdrawal of September 27, 1909, and the supplemental Order of Withdrawal of July 2, 1910, must join in an application for an oil lease, and if they do not so join, or all of them are not named in the application for lease, all cotenants who do not join, or are not joined, in the application for lease, and the lease issued thereon, automatically lose all title, interest and estate in the leased premises that before were vested rights under the constitution and laws of the United States, and are forever barred to enforce them in any court. The most of the admitted facts in the record are recited by the court in the first part of its opinion, which conclusively show that at the time of the application for and issuance of the oil lease in this case, the relation of cotenants or tenants in common between the heirs of George McManus and the defendants still existed; and under the law as hitherto laid down by this Court, by the Federal Circuit Courts of Appeal and District Courts, and the Supreme Courts of the various western mining states, such cotenancy still exists in the land and the legal title thereto evidenced by the oil lease granted by the Government of the United States to the defendants; but that estate is declared to be a nullity, in law and in fact, by the decision of the Circuit Court of Appeals in this case, which is wholly at variance with and in effect overrules the decisions of this Court, the United States Circuit Courts of Appeal of the Eighth and other Circuits, and the decisions of the various state Supreme Courts necessarily following the federal courts on this question. The decision of the Circuit Court of Appeals in this case, in the majority opinion, is that each and every co-owner and cotenant of a mining claim, in order to be entitled to an undivided interest in any oil

lease from the Government must have *personally* relinquished, and not by trustee, or agent, or by operation of law, to the United States, all their right, title and interest therein claimed or possessed prior to July 3, 1910, and have paid to the United States as royalty an amount equal to the value of the time of production of one-eighth of all the oil or gas already produced, within six months after February 25, 1920, the date of the passage of the Oil Leasing Act, and in support of and as the basis of this decision the court relies on the decision of this Court in *Anicker v. Gunsburg*, 246 U. S. 110, and quotes from that case as follows:

"In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary."

That is the authority relied upon and quoted by Judge Miller in the prevailing opinion as decisive against the equitable claim of an admitted cotenant in a mining claim upon which an oil lease has been issued by the Secretary of the Interior. The quotation, and the case from which it is taken, are both a conclusive refutation of the applicability of those principles to the case at bar. That case was a contest between two adverse claimants, one of whom had a lease, approved by the Secretary of the Interior, from an Indian ward of the Government who was the allottee of the land in controversy, but could not make a lease of it without the approval of the Secretary of the Interior, and the other claimant who had a lease executed by the same Indian ward, that had not been approved by the Secretary, whose discretion and office in the premises was ended upon the giving of his approval to either lease.

The lessor, in the case of *Anicker v. Gunsburg*, 246 U. S. 110, was an Indian ward of the Government, who could not make a valid lease of the property without such lease having the approval of the Secretary of the Interior. Until

such approval neither lessee had any shadow of right or title that could be enforced against their lessor, or that one lessee could enforce against another who had received an unapproved lease from their common grantor the Indian ward. The Regulation involved in that case, which Anieker claimed gave him the right to the approval of his lease because filed first within the thirty day period provided by it, conferred no right upon any person who had procured a lease from an Indian ward without the Secretary's approval, for the very good reason that the statute, Section 20 of the Act of April 26, 1906, 34 Stat. at L. 145, Chap. 1876, passed to protect the rights of full blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, provided that all leases and rental contracts made by such Indians for a term exceeding one year, ". . . Shall be in writing and subject to the approval of the Secretary of the Interior *and shall be absolutely void and of no effect without such approval*: . . . Provided, . . . that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

Another statute, Section 2 of the Act of May 27, 1908, (35 Stat. at L. 312, chap. 199) provided that: "That leases of restricted lands for oil, gas or other mining purposes, . . . may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

Another statute, The Act of March 1, 1907 (34 Stat. at L. 1026, chap. 2285) provided that: "The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

Under the authority to make rules the Secretary of the Interior provided:

"All leases shall be in quadruplicate, and, with the papers required, shall be filed within thirty days from and after the date of execution by the lessor with the United

States Indian Agent at Union Agency, Muskogee, Oklahoma."

It is true that the statutes above quoted do not vest arbitrary authority in the Secretary of the Interior. But they do give him power to consider the advantages and disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate. Such approval rests in the exercise of his discretion, and unquestionably this authority was given to him by the statutes above quoted for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation.

The Regulation invoked in that case conferred no rights and invaded no rights, but was simply a tautological repetition of the statutes. No person with an inchoate lease, as in the case of a lease not approved by the Secretary, had any right that could be invaded by any law, or any regulation, and no rights or title or interest that could be enforced in any court. The statutes and regulation involved in the Anicker-Gunsburg case conferred no rights upon persons dealing with full blood Indian allottees of the Tribes mentioned, wards of the United States, but on the contrary restricted the right of those Indian wards to deal in respect of their lands with any person, and any prospective lessee dealing with an Indian had notice by the statutes that no right, title or interest would accrue to him under any instrument purporting to be a lease for more than one year, unless and until such lease should have the Secretary's approval, and without that approval *no right accrued to him of which he could be deprived*, and therefore no legal right that could be enforced against either the prospective lessee or the Secretary of the Interior in any form of proceeding, at law, in equity, or by mandamus. The statutes in that case contain *no offer or promise* from the United States that it would recognize any person as having rights under a lease from an Indian ward before its approval by the Secretary, nor even that the first in point of time in the execution and

filing of such a lease, should have any right or preference in law, but leaves the matter of the approval of any lease wholly and entirely with the discretion of the Secretary of the Interior, and as such discretion is to be exercised in the protection of the ward's property by the guardian before any adverse interests of third parties can attach to the property of the Indian ward, and thus create an enforceable right, the exercise of that discretion by the guardian's agent the Secretary of the Interior injures no one, is in effect *damnum absque injuria*, and such discretionary act of the Secretary is not reviewable in the courts.

There were no statutes involved in the case of *Anicker v. Gunsburg*, that *made an offer, or gave any preferential right, to any person, or class of persons*, who desired to obtain a lease of oil lands from any Indian ward of the Government. Who shall receive any lease from any of such Indian wards, is not conditioned upon the existence of previous vested rights, nor upon the existence of any right contractual or otherwise, and no consideration, such as the relinquishment of previous existing rights by the prospective lessee, is or can be required, as there were no adverse claims or rights outstanding or vested in the lands allotted to the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes in the Indian Territory. That case involved an adverse claim, founded on adverse rights, attempted to be granted to different parties, subject to the approval of an official third party, and until such approval was given by the Secretary of the Interior no right, title, interest or estate of any kind or character was vested in either lessee from the Indian owner. It was not a question of the ownership of land by tenants in common and the title of an undivided interest therein such as is involved in the ownership of a mining claim, and no fiduciary relation, or relation of trust and confidence existed or could exist between two rival claimants claiming under different instruments of title, who sought to secure the approval of the Secretary of the Interior to their respective leases. The prevailing opinion of

the Circuit Court of Appeals in this case rests for its authority on the Anicker-Gunsburg case, and the majority of the Court rests its opinion on that authority despite the admitted facts found to exist in this record, that the application for an oil and gas lease by the defendant the Federal Oil & Development Co. was the application of a co-owner with the heirs of George McManus, and that the application and relinquishment were made by the cotenant within the time prescribed by section 18 of the Act; that in law the application of the defendant in this case inured to the benefit of the heirs of George McManus as cotenants; that the application of the defendant for a lease was the application of the heirs of George McManus; its rights are their rights; and under the authority of the decisions of this Court in *Turner v. Sawyer*, 150 U. S. 525, *Rector v. Gibbon*, 111 U. S. 276, *Germania Iron Co. v. United States*, 165 U. S. 379, and *Duluth & Iron Range Railroad Co. v. Roy*, 173 U. S. 587, and of the Circuit Court of Appeals of the Eighth Circuit in the case of *Stevens v. Grand Central Mining Co.*, 133 Fed. 28, it is not necessary for the plaintiff in the instant case to do anything more than to show and establish his interest and title as a tenant in common or cotenant to be entitled to a decree holding his faithless cotenant as a trustee, and compelling such cotenant to convey an undivided one-eighth interest in the common property and the legal title thereto evidenced by the oil lease from the Government.

It may be further noted that the case of *Anicker v. Gunsburg*, *supra*, was a suit brought *to overthrow, not affirm*, the action of the Secretary of the Interior in "*approving*" a lease to Gunsburg, which approval of the Secretary was necessary to vest any title or interest in the premises in either Gunsburg or his adversary, and until such approval neither party had any right in the property that he could enforce, or was in privity with their grantor. The suit in the case at bar, is brought in affirmance and ratification of the act of the Secretary of the Interior in granting the oil

lease to the defendants, and to enforce a trust in an undivided interest *in the lease*, and *not against the lease*; this case does not seek in any manner to overthrow the act of the Secretary of the Interior in granting the lease in which a trust is sought to be enforced, but affirms the Secretary's action in that regard. This should be enough to differentiate the case of *Anicker v. Gunsburg* from the instant case. To apply the principles announced in *Anicker v. Gunsburg* and *Bohall v. Dilla*, and similar cases, to such a totally different state of facts and legal relations as are involved in the case at bar, is such a glaring misapplication of those principles that it seems trivial and futile to refute it.

The case of *Bohall v. Dilla*, 114 U. S. 47, also cited by Judge Miller, in the majority opinion in this case, was a controversy between two rival pre-emption claimants, each claiming the title under a different preemption filing and a different settlement. Bohall's claim was invalid from its inception; he never had any privity of estate with the United States as he had never complied with the requirements of the law under which he claimed the right of pre-emption. It is evident that there could not be any tenancy in common or cotenancy, or any fiduciary relation, or any relation of trust and confidence, between such adverse claimants to the same tract of land, and that the rules and principles applicable to such cases as *Bohall v. Dilla*, cannot properly be applied to the facts in the case at bar.

District Judge Miller in his opinion in this case also cites the cases of *Madden v. Lancaster County*, 65 Fed. 188, and *United States v. Missouri Pacific Ry. Co.*, 213 Fed. 169, but we fail to see how they are in point as authorities in this case.

The case of *Madden v. Lancaster County* was an action to recover damages for personal injuries sustained by reason of a defective bridge owned and maintained by the county. The statute conferring this right of action contained a limitation that such action should be commenced within thirty days of the time of such injury or damage

occurring. The plaintiff in that case did not bring his action until over six months after he sustained the injury for which he sought to recover damages. It is a far cry from that case to the case at bar. If, in the instant case no cotenant of the heirs of George McManus had ever applied for a lease, then it might be reasoned by analogy that the two statutes mean the same thing, but in the instant case the defendant was at the time it made its application for a lease, and still is, the cotenant of George McManus, his heirs, and the plaintiff. The application of this cotenant was made within the time prescribed by section 18 of the Act. In law the defendant's application inured to the benefit of the heirs of George McManus as the defendants' cotenants. The defendants' rights are their rights, and the presentation of its application for a lease was the presentation of an application for the benefit of the McManus heirs to whatever interest they were entitled to in the premises.

The case of *United States v. Missouri Pacific Railway Co.*, 213 Fed. 169, also cited by Judge Miller in his opinion, was an action arising under the Federal Hours of Service Act, in which the Government sought to collect a penalty for the act of the railroad in keeping a telegraph operator at a country station on duty more than the number of hours prescribed by the law, owing to an unavoidable accident causing a wreck upon its road, not caused by the negligence of the Railroad Company. And the holding of the Circuit Court of Appeals in that case was that the proviso of section 3 of the Act of March 4, 1907, commonly known as the Hours of Service Act, means what it says, and exempts a common carrier from liability for the penalty specified therein, when, in case of casualty, unavoidable accident, or the act of God, it necessarily requires or permits a telegraph operator, train dispatcher, or other employee of their class, to serve beyond the time limited for his service by section 2 of that Act.

U. S. v. Missouri Pac. Ry. Co., 213 Fed. 175

In support of defendants' contention on this branch of

the case, their counsel cite the case of *Johnson v. Riddle*, 240 U. S. 467. The defendants assert that that case involved the relation of lessor and lessee, that a fiduciary relation therefore existed between the two claimants for the Indian town lot involved in that controversy, and that the rule applied by the court in that case should be applied to the facts involved in the case at bar. Therefore, it becomes necessary to ascertain if the case of *Riddle v. Johnson* supra, is the same, or similar in its facts, and the applicable law, to the case at bar, and this can only be done by a recital of the facts in that case as stated by the Supreme Court: "The subject of this action was a town lot in the town of Chickasha in the Chickasaw district of the Choctaw nation, to which the plaintiff claimed title by purchase under the townsite provisions of the Atoka Agreement with the Choctaw and Chickasaw tribes, found in the Act of Congress known as the Curtis Act of June 28, 1898, Chap. 517, 30 Stat. at L. 495, 505, 508, followed by a patent executed, after the commencement of the action, in accordance with the supplemental agreement of the same tribes, Act of July 1, 1902, and set up in a supplemental complaint. The defendants admitted the legal title to be in Riddle, but sought to have him declared a trustee for their benefit and decreed to convey the title to them.

"The facts are as follows: Some years prior to the making of the Agreement, one Fitzpatrick, a white man, not entitled to citizenship in any Indian tribe, made a lease of the lot in controversy, then vacant and unimproved, to one Barnhart, who went into possession and erected a substantial house and other improvements, which were to belong to him, subject to the payment of the ground rent to Fitzpatrick. There is nothing to show what right Fitzpatrick claimed, or that in fact he had any right to seize upon vacant tribal lands and contract concerning them as he did. In the year 1897, Barnhart sold the improvements and transferred the possession of the lot to one Ellis, who entered into possession and made further improvements.

About April 1, 1898, Ellis refused to pay rent, and on July 7, of the same year, Fitzpatrick brought a suit for unlawful detainer against him in the United States Court, alleging that he desired to obtain possession for the purpose of being able to place upon the lot such improvements as would protect his right to the land under the provisions of the Atoka Agreement. Fitzpatrick prevailed in the United States Court, and, on appeal, in the Court of Appeals for the Indian Territory, and also in the Circuit Court of Appeals for the Eighth Circuit, whose decision was rendered October 27, 1902. Meanwhile Ellis maintained possession by means of a supersedeas bond. The claim of Fitzpatrick to the right of possession finally passed to E. B. and H. B. Johnson, and Ellis conveyed his rights to Riddle and Cook, and afterwards Riddle bought that interest from Cook. In February, 1902, the Townsite Commission for the Chickasaw Nation organized pursuant to the provisions of the Atoka Agreement, visited Chickasha for the purpose of appraising town lots and awarding them to persons having the preferential right to purchase under the terms of the Agreement. The lot in controversy was scheduled to Riddle and Cook, and on June 12, 1902, they were notified that they had the right to purchase, of which they availed themselves by paying to the United States Indian Agent the proper percentage of the appraised value to make up the full purchase price of the lot, and took from him a proper receipt. In January, 1903, after the decision of the Circuit Court of Appeals Fitzpatrick and his grantees obtained possession of the lot with improvements, and the present action was commenced by Riddle and Cook against Fitzpatrick and the persons in possession. Thereafter Fitzpatrick and his intermediate grantees conveyed their interest to the Johnsons, and they were substituted as defendants, and Riddle having bought the interest of Cook became the sole plaintiff in the action. The Atoka Agreement between the United States and the Choctaw and Chickasaw Tribes was ratified at a special election held on August 24, 1898, the

result of which was ascertained and proclaimed on August 30th by a Board of Commissioners for that purpose designated by the Act and the Agreement thus became effective. That Agreement gave a preferential right to purchase any lot to the person who should have placed on such lot, "permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses," at the price a fee simple title to the same would bring in the market at the time the valuation was made, but not to include in such value the improvements thereon. After the commencement of the action of ejectment in January, 1903, the grantees of Fitzpatrick instituted a contest against Riddle concerning the awarding and scheduling of the lot in question to the latter. This contest was heard by the Indian Inspector, and by him decided in favor of Riddle. His decision was affirmed by the Commissioner of Indian Affairs, and upon appeal to the Secretary of the Interior it was again affirmed. In the unlawful detainer suits brought by Fitzpatrick, the grantor of the Johnsons, the ownership by Ellis of the permanent, substantial and valuable improvements on the lots, was not denied or disputed, but on the contrary was admitted by Fitzpatrick in his pleadings, and they were in no way adjudicated upon in that suit. Riddle and Cook afterwards purchased the improvements from Ellis, and having received notice from the Townsite Commission, as already mentioned, of their right to purchase the lot under the provisions of the Atoka Agreement, they forwarded the United States Indian Agent a proper percentage of the appraisement to make up the full purchase price of the lot, and received his receipt for the same. After the final determination of the contest before the Department of the Interior, a patent was issued to Riddle and his associates dated in May, 1907."

On these facts the following observations may be made: Fitzpatrick never had any right or title to the lot in controversy, not to the possession thereof, but was a naked trespasser, and had no right to contract concerning it as he

did with Barnhart. The permanent, substantial and valuable improvements were placed upon the lot by Barnhart and Ellis and indisputably belonged to them. The title of Ellis to those permanent, substantial and valuable improvements was not disputed in the unlawful detainer suit between Fitzpatrick and Ellis. Ellis was the owner of the improvements at the time the Atoka Agreement went into effect on August 30, 1898. Under the Atoka Agreement it was the owner of the improvements, who alone was recognized as entitled to be considered in the sale of the town lots. The Atoka Agreement terminated the lease between Fitzpatrick and Ellis, and also terminated the relation of landlord and tenant, if it ever existed, under that lease of an unlawful right of possession. Fitzpatrick never had any lawful right of possession upon which to found an equity. Under the facts found, both he and Ellis were trespassers upon the lands of the Indians in disregard of rights secured to the latter by treaty with the United States, and in violation of Section 2118, Rev. Stat. of the United States. The lease created a mere estoppel between trespassers. The rights, if they may be called rights, of lessor and lessee alike, were terminated by the force of the Atoka Agreement. Individual ownership of the land originated with that instrument, and could be only such as by its terms was created. At the time the Atoka Agreement went into effect Fitzpatrick and his successors had not placed any permanent, substantial and valuable improvements upon the lot in controversy, and they never did; before the Atoka Agreement Fitzpatrick never had any right of possession of the land as against the Indians; he had no rights at all except as against his tenant Ellis, and against him only by way of estoppel, but Ellis as tenant was not estopped to show that his landlord's title had expired, or had been terminated by operation of law, when the Atoka Agreement went into effect, and after that occurred, Ellis, the owner of the improvements, had the preferential right to purchase the lot, which he exercised, and he occupied no fiduciary

relation, as tenant or otherwise, with Fitzpatrick, who never had placed any improvements upon the lot, who never had a lawful right of possession against the paramount owner of the property, and who did nothing except to transfer to Ellis an unlawful possession by means of a lease that gave neither party any rights in the premises. If Fitzpatrick had had any equitable right or interest in the improvements upon the lot in controversy, a very different question would have been presented, but he had none. We now say, that if the foregoing facts which appear in the case of *Johnson v. Riddle*, *supra*, show that any relation of landlord and tenant, or lessor and lessee, or any fiduciary relation whatever, existed between Fitzpatrick and Ellis, who were the respective grantors of *Johnson* and *Riddle*, at or previous to the time the lot was awarded to and purchased by *Riddle* and *Cook* from the Indians under the *Atoka Agreement*, or that Fitzpatrick and Ellis ever had any community of title, or interest, or estate, in the lot, such as would create an equitable interest in the premises and give Fitzpatrick and his grantees a right to enforce a trust after the patent was issued, such as exists between the co-owners and tenants in common of a mining claim upon which a patent or oil lease is issued upon the application of and to one of the co-owners and cotenants, then words have no meaning, and facts have no significance, and there is nothing more to be said. But the legal effect of their relations was what this Court, in deciding that case, so aptly states:

“But, if Ellis had given up possession, Fitzpatrick would have had no more right than any other white man to enter and erect improvements,—that is to say, none at all. At most, he would have had a mere opportunity, without right, and the deprivation of this cannot furnish a foundation for impressing a trust upon the title afterwards acquired by Ellis, the grantee, by direct purchase from the owners of the paramount title. . . . The *Atoka Agreement*, while accepting existing improvements of a substantial nature as part consideration for the purchase of town lots, contained

no recognition of legitimacy in the previous occupation of the soil by white men, nor any official ratification of their intrusion upon the Indian lands. It laid aside, as immaterial, the question whether improvements had been constructed with or without rightful possession of the land.

. . . *If Fitzpatrick had had any equitable right in the improvements upon the lot in controversy, a very different question would be presented. But he had none. (Italics ours)."*

Johnson v. Riddle, 240 U. S. 480, 481, 482

**THE TENANCY IN COMMON BETWEEN GEORGE
McMANUS, HIS HEIRS AND SUCCESSORS IN IN-
TEREST AND THE DEFENDANTS STILL EX-
ISTS, AND HAS NEVER BEEN DESTROYED
BY OUSTER, DISSEISIN AND ADVERSE
POSSESSION, AND THIS ACTION IS
NOT BARRED BY THE STATUTE
OF LIMITATIONS.**

One of the grounds of the motions to dismiss is that the relief sought in this case is barred by the Statute of Limitations of the State of Wyoming. (R. 25-31.) This contention is made by the defendants as a basis for their plea of laches, as federal courts of equity are not bound by state statutes of limitations, but only act in analogy to them. It is well settled that while courts of the United States are required by the statutes creating them to accept as rules of decision in trials at common law the laws of the several states, except where the Constitution, laws, and the treaties of the United States, otherwise provide, their jurisdiction in equity is to be exercised according to the rules and principles applicable alike to every state and cannot be impaired by the laws of the respective states.

Kirby v. Lake Shore R. R. Co., 120 U. S. 130

Ide v. Carpet Co., 115 Fed. 137, 148 (C. C. A. 8th)

We now ask where is there to be found in the bill of complaint the allegations necessary to support this contention. The defendants rest their case upon the motions to dismiss, and the case must be determined, in its present shape, upon the theory that the facts are as alleged in the bill. This rule is too well established to need the citation of authority. But counsel for defendants proceed upon the assumption that their motion to dismiss has successfully contradicted and overthrown every material allegation in the bill of complaint, and proceed to argue the case upon false deductions, strained inferences, and assertions as to

an assumed state of facts, none of which are to be found in this record. But this cannot avail them. They have elected to take the case as made by the bill and they must abide by it. Every deed recited in the bill shows on its face a conveyance of an undivided interest only. All the authorities hold that such a deed, standing alone, and the deeds in this case were executed and delivered years apart and by different grantors, is not an ouster of a tenant in common, and, without being followed by other acts, *fully proved*, showing that the possession following the entry was actual and exclusive, adverse and hostile, visible and notorious, continuous and uninterrupted, *will not set in motion the statute of limitations*.

Further, the defendant the Federal & Development Company never made any claim that it acquired any interest in the O'Glase claim by a prescriptive title under the statute of limitations, until after the commencement of this action, when the defendants have been driven to urge it by the necessities of their case. In order to obtain the oil and gas lease the defendant the Federal Oil & Development Company in its application for lease alleged, "That said company purchased said land in the due course of trade, in which *they relied upon the record title to the same.*" (R. 9.) In the Interior Department, in order to obtain the lease, they necessarily alleged the acquirement of title to the O'Glase claim by purchase; after the procurement of the lease, and in order to defeat the enforcement of a trust in it in favor of their co-owners and cotenants, the defendants in this action urge that they acquired their title *by prescription, and not by purchase*.

There having been no attempt made to forfeit the interest of McManus, the presumption is that his share of the assessment work has been paid and his possession still maintained as a co-owner, and though the assessment work due from McManus since his death has not been contributed by his heirs, then the failure to take forfeiture proceedings against his interest shows an unequivocal election

on the part of the defendants, upon the record as presented on this appeal, to hold the claim in common with him and his heirs. The defendants had full knowledge of his rights, and that they had not acquired them, and cannot be heard to now set up an adverse title by argument, without pleading or proving any facts in support of it, when the record plainly shows, and it is admitted by the pleadings, that they never took the method provided by statute for acquiring a co-owner's title upon his failure to contribute his proportionate share of the annual assessment work, and without such steps there could not be adverse possession. The doing of the annual assessment work by one of the co-owners of an unpatented mining claim inures to the benefit of all, and the co-owner who performs that annual labor cannot predicate an adverse possession on that fact standing alone. Knowledge or notice must be unequivocally brought home to his co-owners that he is doing it under an adverse claim of sole ownership.

Wailes v. Davies, 158 Fed. 672

Affirmed by 9th Cir. Ct. of App. in 164 Fed. 397

Jupiter Min. Co. v. Bodie Con. Min. Co., 11 Fed. 666

Book v. Justice Min. Co., 58 Fed. 106

Godfrey v. Faust, 18 S. D., 567, 571

Eberle v. Carmichael, 8 N. M. 169

Dye v. Crary, 13 N. M. 439

Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673

Nesbitt v. DeLamar's Nev. G. M. Co., 24 Nev. 273

2 Lindley on Mines, Sec. 633, 666

Yarwood v. Johnson, 29 Wash. 643

Such knowledge or notice is not unequivocally brought home to an absent cotenant by the record of two quit-claim deeds, given nearly two years apart, by two tenants in common to a third tenant in common, and each deed purporting on its face to convey only an undivided one-half interest in the common property. Where one tenant in common is in possession of the whole of the joint property, the presumption is that he is holding for his cotenants as well as for himself, according to their respective rights,

and the other cotenant has the right to so understand until he has notice to the contrary. There is nothing in the bill in this case to show that the heirs of George McManus had any knowledge, or that the actions and conduct of the defendants even tended to give notice, unequivocal or otherwise, of any adverse claim of the defendants to the McManus interest in the premises.

Chapter 355 of the Wyoming Compiled Statutes of 1920, on the subject of limitation of actions, contains 22 sections numbered from 5558 to 5579, both inclusive. Sections 5558 and 5564 of those Statutes, read as follows:

"Sec. 5558. Application of this Chapter. This chapter shall not apply to actions already commenced, nor to cases wherein the right of action has already accrued; but the statutes in force when the action accrued shall be applicable to such cases, according to the subject of the action and without regard to the form, nor shall this chapter apply in the case of a continuing and subsisting trust, nor to an action by a vendee of real property in possession thereof, to obtain a conveyance of it."

"Sec. 5564. Limited to Ten Years. An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of such action accrues."

This action involves the case of a continuing and subsisting trust, and Section 5558, *supra*, applies. Therefore, the cause of action sued on is not barred by Section 5564, *supra*, and its provisions can have no application to this case.

- Turner v. Sawyer, 150 U. S. 585-586
- Brundy v. Mayfield, 15 Mont. 201, 38 Pac. 1070
- Ballard v. Golob, 34 Colo. 417
- Rothwell v. Dewees, 2 Black, 619
- Flagg v. Mann, 2 Sumn. 486, 524
- Van Horne v. Fonda, 5 Johns. Ch. 409
- Swinburne v. Swinburne, 28 N. Y. 568
- Knolls v. Barnhart, 71 N. Y. 474.
- Venable v. Beauchamp, 3 Dana, 321

Bracken v. Cooper, 80 Ill. 229

Shell v. Walker, 54 Iowa, 386

Buchanan v. King's Heirs, 22 Grattan, 414

But, in any event, ten years have not elapsed since the cause of action accrued. The defendant's counsel in the court below contended that the period of the analogous statute of limitation at law had run before this action was commenced, and that therefore the burden is on the complainant to show by suitable averments in his bill that it would be inequitable to apply it to this case. The plaintiff has met that burden, and shown by the allegations of his bill in the instant case that the ten year statute of limitations of Wyoming does not and cannot apply in this case, and that it would be inequitable to apply it to this case. It may be that the defendants by their contention as to the analogous statute of limitations at law, which was very vague, were seeking to persuade the court that the six months period of limitation contained in the Oil Leasing Act in which to apply for an oil and gas lease under the provisions of that statute, is the analogous statute at law that should be applied to a suit in equity that has as its object the enforcement of a trust in a mining claim owned by tenants in common, upon which an oil lease has been granted to one of the cotenants upon that cotenant's sole application. If this is the application sought to be made of the six months limitation contained in Section 18 of Oil Leasing Act, as a foundation for the plea of laches, then the statute itself is its complete refutation. That statute does not bar any action at law or suit in equity, and does not even contain any words that say that an applicant for a lease shall be "barred" if application be not made for such lease within six months. Its claimed force and effect as a bar is not found in the very words of the statute, but only by implication from the use of the words "That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed

prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law, * * * shall be entitled to a lease thereon . . .” (Section 18, Oil Leasing Act.) Thus if that statute is construed as a bar to an application for a lease after six months from the passage of the Act, such construction must be arrived at by a process of inclusion of words, and not from the letter of the statute. A statute that is claimed to be a statute of limitations and to operate as a bar to an action at law or suit in equity, must by its very words state that such action or suit shall be barred, before it can be held to apply to such actions.

A tenant in common out of possession has a right to rely upon the possession of his cotenant as one holding according to the title, and for the behalf of all interested, until some action is taken by the other evidencing an intention to assert adverse and hostile claims. If one enters upon the land of a *sole owner* and without his consent, *he* must know that such possession exists, and within the time permitted by law take steps to vindicate his right. But the possession of a cotenant is a lawful possession, and of and by itself is not evidence of an ouster. Thus a tenant in common will not be permitted to claim the protection of the statute of limitations unless it clearly appears that he has repudiated the title of his cotenant and is holding adversely to it. Possession and payment of taxes upon the property do not constitute the assertion of an adverse right. There must be something more. The acts relied upon by the tenant in common in showing an ouster of his cotenants and the assertion of an adverse claim should be more certain and unequivocal in character than would be necessary in ordinary cases where there is not privity of estate between the parties claiming the property; and in order to affect the cotenants with this adverse holding notice of such fact must be brought home to them, either by information to this effect given by the tenant in common asserting the adverse right, or by such acts of unequivocal notor-

ity in the assertion of such adverse and hostile claim that they would be presumed to have notice of such adverse right. Whatever must be shown in establishing an ouster and an adverse right *must be proved by the tenant in common asserting such facts.*

Yarwood v. Johnson, 29 Washington, 643
 Culver v. Rhodes, 87 N. Y. 348
 Weshgyl v. Schick, 113 Mich. 22
 Richards v. Richards, 75 Mich. 408
 Colburn v. Mason, 25 Maine, 434
 Hudson v. Coe, 79 Maine, 83
 Stevenson v. Anderson, 87 Ala. 228, 232
 Parker v. Proprietor of Locks, 3 Mete. 91 (Mass.)
 Ingalls v. Newhall, 139 Mass. 268, 273
 Hume v. Long, 53 Iowa, 299
 Burns v. Byrne, 45 Iowa, 285
 Lindley v. Groff, 37 Minn. 388
 Campbell v. Campbell, 13 N. H. 483
 Fye v. Payne, 82 Va. 759
 McGee v. Hall, 26 S. C. 179
 Page v. Branch, 97 N. C. 97
 Hicks v. Bullock, 96 N. C. 164
 Comer v. Comer, 119 Ill. 170
 Lick v. O'Donnell, 3 California, 59, 63

The distinction between adverse possession as against strangers and as against other tenants in common, and the effect of the conveyance of an undivided interest only, is clearly and fully set out in *Foulke v. Bond*, 41 New Jersey Law, 527, the Court saying:

“In the acquisition of title by adverse possession the distinction between strangers and tenants in common relates to the character of the evidence necessary to prove that the possession was adverse. The relations between the joint owners are presumed to be amicable rather than hostile, and the acts of one affecting the common property are presumed to be done for the common benefit. This presumption is liable to be overcome by the circumstances of the particular case. It is a rule of evidence merely, which enters into the question whether the possession is in fact ad-

verse, and not a rule of law, which forbids the application of the statute of limitations to persons who occupy to each other the relation of tenants in common. It is with respect to these two essential qualities of the possession, on which the title by lapse of time is founded, hostility in fact to the title of the true owner, and notoriety of the adverse claim that the fact of a cotenancy between the parties becomes an important element. If the parties are strangers in title, possession and the exercise of the rights of ownership are in themselves, in the absence of explanatory evidence, proof of an ouster of the true owner, whereas, in cases of privity of title, such as subsists between tenants in common, the acts of possession of one tenant will, in the absence of satisfactory evidence to the contrary, be referred to the community of title, and there must be clearer and more decisive evidence of an ouster by one tenant in common of his associate than is necessary to prove that a person having no right of possession had ousted an owner in severalty. An ouster by a tenant in common does not differ in its nature from any other ouster, except in the degree of evidence required; in other cases the assumption of ownership is more clearly adverse; in case of a tenant in common such assumption of ownership, and the acts which indicate it, may be consistent with an acknowledgement of the rights of the cotenant, and therefore, acts which are decisive in one case are equivocal and insufficient in the other. The presumption that the entry of one cotenant is for the benefit of all applies to a third person who acquires an undivided interest under a conveyance to that effect from one of the original cotenants. He has title to an undivided interest, and his entry is presumed to have been in accordance with his title. But where the grantee has obtained a conveyance of the whole estate by one of the cotenants, entry made under such a title is a disseisin of the other cotenants. Entry by a grantee holding under a deed of conveyance for the entire estate, made by one of the cotenants and duly placed of record, has all the constituent elements of a disseisin at

common law. The conveyance by one tenant of the estate in entirety is decisive of his purpose to appropriate the entire estate to his own use, especially if his deed contains full covenants of seisin and warranty. The entry of the grantee under such a conveyance is equally evincive of his intention to claim the whole to the exclusion of the cotenants, and if the deed be duly recorded the transaction acquires that notoriety which is equivalent to the notoriety of livery of seisin. The disseisin thereupon becomes complete, and if possession be held continuously thereafter for the period of twenty years by open and notorious acts of ownership, without any interference on the part of the other cotenants, title to the whole estate may be acquired by adverse possession."

Foulke v. Bond, 41 N. J. L. 547

May v. Chesapeake & O. Ry. Co., 184 Kentucky, 493

On March 11, 1884, George McManus, Perry Doan and Sam Bedsaul executed and delivered to Cy Iba and Shepherd Fales a joint power of attorney to locate lode and placer mining claims in Carbon County, Wyoming, and to jointly sell and convey as joint agents for their said principals *such lode and placer mining claims as might be located by the said Shepherd Fales and Cy Iba as attorneys in fact for their said principals above named.* (R. 11-13.) Neither Cy Iba nor Shepherd Fales ever located any mining claims for any of the locators of the O'Glase claim as their attorneys in fact, and the O'Glase claim was not located by Cy Iba and Shepherd Fales, or either of them. (R. 2-3-14-15.) On April 6, 1886, M. Iba, Hall, Snively, Ashcraft and Bedsaul granted such a power of attorney to Cy Iba as the sole constituent. (R. 11.) On December 31, 1888, Hall revoked his power of attorney to Cy Iba. (R. 11.) Wm. F. Ford never granted a power of attorney to Cy Iba. On February 18, 1890, Cy Iba executed, as attorney in fact for the locators, (R. 11.) and pretending to act as attorney in fact for George McManus, but without being joined by Shepherd Fales (R. 15.) a quit claim deed purporting to

convey to Victoria A. D. Johnson an undivided one-half interest in the O'Glase claim. (R. pp. 11-15.) This deed to Victoria A. D. Johnson made her a tenant in common with George McManus, as it actually conveyed to her an undivided one-half of the one-eighth interests of the locators Bedsaul, Ashcraft, Snively, and M. Iba, and thus made Victoria A. D. Johnson a tenant in common with George McManus and his heirs. This deed of February 18, 1890, did not and could not convey any of the interests of the locators McManus, Doan, Ford and Hall in the O'Glase claim, as is fully shown by the allegations of the bill of complaint. (R. 11-13-14.) And the defendants have never acquired those interests. On March 16, 1900, the locators Bedsaul and Ashcraft conveyed what interest they had in the claim to Cy Iba. (R. 11.) This conveyance conveyed the two one-sixteenth interests that Bedsaul and Ashcraft had remaining in the claim, (R. 11.) and made Cy Iba a cotenant in the O'Glase claim with George McManus and Victoria A. D. Johnson. On April 12, 1905, Cy Iba executed in his sole behalf a quit claim deed purporting and pretending to convey to Joseph H. Lobell an undivided one-half interest in the O'Glase claim (R. 11-15.) On and prior to April 12, 1905, Cy Iba actually had no interest in the O'Glase claim other than the interest conveyed by the deed of Bedsaul and Ashcraft on March 16, 1900, which in fact conveyed only an undivided one-eighth interest. (R. 11-15-16.) At the time of that conveyance from Cy Iba to Joseph H. Lobell he was a co-owner and cotenant with McManus and his heirs, and by accepting such conveyance of an undivided interest in the O'Glase claim Joseph H. Lobell became a cotenant with the heirs of George McManus, Victoria A. D. Johnson, and Perry Doan, George B. Hall and Wm. F. Ford, the other colocators and co-owners of said O'Glase claim. On February 16, 1907, Victoria A. D. Johnson conveyed the undivided interest she had acquired by the deed of Cy Iba of February 18, 1890, by a quit claim deed purporting to convey an undivided one-half

interest in the O'Glase claim to Frederick J. Lobell, who two days later conveyed same to Joseph H. Lobell. (R. 11.) This deed from Victoria A. D. Johnson to Frederick J. Lobell made him a cotenant with George McManus and his heirs, and also a tenant in common with Joseph H. Lobell, who had been a cotenant with George McManus and his heirs, and Victoria A. D. Johnson, since April 12, 1905, and J. H. Lobell knew by the record that Victoria A. D. Johnson did not own an undivided one-half interest, but only an undivided fourth, when he took the deed from his brother. (R. 11.) The undivided interest in the claim thus acquired by Joseph H. Lobell passed on August 26, 1915, to the applicant the Federal Oil & Development Company, (R. 11-16.) and the alleged right and title of the defendant the Federal Oil & Development Company to the title, interest and estate of George McManus in and to the O'Glase claim rests solely upon the said deeds hereinbefore described. (R. 16.) These facts, as disclosed by the allegations of the bill in this action, show conclusively that George McManus and his heirs were at all times cotenants in the O'Glase placer mining claim with the predecessors in interest of the defendant the Federal Oil & Development Company, and that when the Federal Oil & Development Company acquired the undivided interests of the original locators M. Iba, Snively, Ashcraft, and Bedsaul, by the deed of August 26, 1915, it became and remained a co-owner and tenant in common with the heirs of George McManus, and that cotenancy has never been terminated or destroyed, as is shown by all the remaining allegations of the bill of complaint. (R. 1-22.)

A tenancy in common between the colocators and co-owners of a mining claim is a relation created by law, and not by contract or actual agreement of the parties. The relation of cotenancy exists between the owners of a mining claim whether they acquire their interest therein by location, by deed, or by purchase at an execution sale, or in any other manner, as all the cases cited in a former subdivision

of the brief clearly show. A tenancy in common may be terminated either by uniting all the interests in the land in one tenant, by purchase, or otherwise, which makes him the owner of the whole in severalty, or by making partition between the several cotenants, which gives them each an interest in severalty in a specific part of the land, or by the ouster and disseisin by one of the cotenants of the others coupled with actual, exclusive, adverse, open, notorious and hostile possession of the premises by the ousting cotenant for the period required by the statute of limitations against the disseised cotenants, and in that instance the occupant must not only be in the actual, exclusive and adverse possession of the land, claiming it as a whole, and that such possession is open and notorious, with a claim to himself in all of it, but these facts must be *known to the ousted cotenant*, in order to eventually ripen the possession of the claimant into title in himself. There is not a single allegation in the bill of complaint that goes to sustain any of these means by which a cotenancy can be terminated. The averment in the bill of complaint that the defendant the Federal Oil & Development Company, in its application for the lease, alleged that, "The said claim has been claimed and possessed continuously since prior to July 3, 1910, by this claimant and its predecessors in interest, and is now claimed and possessed by it." (R. 8.) is not an allegation of an adverse possession during all or any part of that period, such as to constitute a bar under the statute of limitations. Such a bar, therefore, does not exist, and as that is a matter of defense it should appear affirmatively, to be of any avail. That allegation, made by the defendant Federal Oil & Development Company in its application for lease, negatives and destroys any presumption of adverse, actual, exclusive and hostile possession of the mining claim by the defendant the Federal Oil & Development Company and its antecedent grantors.

Union Con. Sil. Min. Co. v. Taylor, 100 U. S. 37, 40
The root of the doctrine that the colocators of a mining

claim are cotenants, and that anyone who buys the undivided interest of any of the colocators in the claim thereby becomes a co-owner and tenant in common with the original locators, so unanimously declared by the decisions of all the courts that have considered this question in relation to mining claims and their ownership, is to be found, we may suggest, aside from the general principles applied by the courts to the ownership of other kinds of real estate, in Section 2324 of the Revised Statutes of the United States, prescribing the necessary acts of location and maintenance required to be done by the locators of mining claims on the public domain in order to become the owners of a vested right therein that is salable, inheritable, taxable, and property in every sense of the word, as is shown by the use of the following statutory language: "Upon the failure of any one of *several co-owners* to contribute his proportion of the expenditures required hereby, *the co-owners* who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent *co-owner* personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent shall fail or refuse to contribute his proportion of the expenditures required by this section, his interest in the claim shall *become the property of his co-owners* who have made the required expenditures." (Italics ours.) This is an indisputable statutory declaration that the colocators of a mining claim and their successors in interest are *owners in common* of the mining claim, that such a claim is recognized as *property*, that the nature of this property is real property, and that its *co-owners* are tenants in common. This is a statutory creation of the relationship of cotenancy between the colocators and *co-owners* of a mining claim, impressed with all the rights and obligations that arise by law from such a legal relationship. That is the doctrine unanimously declared by this Court and all the

courts that have considered this question. And that statute is a declaration by Congress that the relationship of *co-owners* and cotenants between the colocators of a mining claim and their successors in interest shall exist and does exist. Thus if the defendants should assert, as they have hitherto done, that judicial decisions do not make law, then the decisions we have heretofore cited on this question in this brief, are a declaration and application of the law as found by the courts to exist, and is declared by the statute shall exist, on the question of the property rights and legal relationship of the colocators and co-owners of a mining claim inter se.

Victoria A. D. Johnson continued as a co-owner and cotenant with all the original locators, including McManus and his heirs, for seventeen years after the conveyance to her by Cy Iba, as attorney in fact for the locators Bedsaul, Ashcraft, M. Iba and Snively, of an undivided one-half of their undivided one-eight interests in the claim, which amounted only to an undivided one-fourth interest in the entire O'Glase claim, and her deed to Frederick J. Lobell on February 16, 1907, purporting to convey an undivided one-half interest in the claim actually conveyed only an undivided one-fourth interest, and this deed made Lobell a cotenant with his co-owners in the claim, among them being the heirs of George McManus, and the quit claim deed of Frederick J. Lobell to Joseph H. Lobell, although purporting to convey an undivided one-half interest, actually conveyed no more than Frederick J. Lobell received from his grantor Johnson. The deed of March 16, 1900, from Bedsaul and Ashcraft to Cy Iba, which purported to convey only what interest they had in the claim to Cy Iba, an undivided two-sixteenths, made him a cotenant with George McManus and the other colocators and co-owners of the claim, and this relation of cotenancy existed between Cy Iba, George McManus and his heirs, Victoria A. D. Johnson, and the other original locators and co-owners of the O'Glase claim for a period of over five years, when Cy Iba

conveyed the undivided one-eighth interest he actually owned in the mining claim to Joseph H. Lobell by a deed purporting to convey an undivided one-half interest, and thus Joseph H. Lobell by that deed succeeded to the same interest of Cy Iba in the mining claim, and became a cotenant with the other tenants in common in the claim. There is not a syllable in any of the averments of the bill of complaint, from which can be drawn any presumption of actual, open, exclusive, adverse, notorious, and hostile possession of the premises by any one of these cotenants against the other for any period of time until the granting of the lease to the defendant the Federal Oil & Development Company. (R. 19.) The deed from Joseph H. Lobell to the Federal Oil & Development Company on August 26, 1915, did not convey or purport to convey the entire interest in the O'Glase claim, but it purported to convey only the title thus acquired by Joseph H. Lobell, which was an undivided one-half interest, he never having received a deed conveying the entire title to the mining claim, or purporting to convey the entire title, and the defendant knew Lobell did not own the entire title (R. 9-11-12-13-14-15-16.) and that interest thus passed to the defendant the Federal Oil & Development Company, as shown by the allegations of the bill heretofore referred to, was only an undivided four-eighths, or eight-sixteenths, of the O'Glase claim. (R. 12-16.) As Joseph H. Lobell did not, in fact, own the whole title, and consequently could not convey the whole title to the Federal Oil & Development Company, it entered as a cotenant and its possession was not adverse to the other co-owners and cotenants; the words of the bill on this point being, "that the color of title thus claimed to be acquired by the said Johnson and Lobell passed on or about August 26, 1915, to said applicant;" (R. 16.) and it thus becomes a question of fact what interest that deed purported to convey or what interest the defendants secured thereby, and thus on this record the presumption is that the defendant the Federal Oil & Development Company

entered as a cotenant and that its holding was not adverse to the other cotenants.

The allegation in paragraph 30 of the bill (R. 19.), that the defendants refuse to recognize the plaintiff's title obviously refers to the time subsequent to their acquiring the government oil lease in 1921, as the context of the paragraph plainly shows, and cannot be tortured into an allegation of continuous hostile holding by the defendants for the statutory period of limitation of actions.

Direct and positive allegations in a bill of complaint as to ownership and possession by the plaintiff are not destroyed by allegations showing how the defendants obtained their alleged title.

Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14

Curran v. Campion, 85 Fed. 67, 29 C. C. A. 26

An entry upon land under deeds from several tenants in common, of their respective interests, which do not equal the whole, is not tantamount to an ouster of the other cotenants, and will not put in motion the statute of limitations as against such cotenants, though the deeds purported to convey undivided interests equaling the entire estate. The deeds to Joseph H. Lobell were for undivided interests only. The entry of Joseph H. Lobell under the deed from Cy Iba of April, 1905, purporting to convey an undivided one-half interest, is subject to the presumption that the entry of one cotenant is for the benefit of all, as that presumption applies to a third party who acquires an undivided interest under a conveyance to that effect from one of the original cotenants; the deed from Victoria A. D. Johnson of February 16, 1907, to Frederick J. Lobell and his entry under the same, is subject to the same presumption. When Frederick J. Lobell two days later gave a deed purporting to convey to Joseph H. Lobell an undivided one-half interest in the premises, he was a cotenant of the heirs of George McManus and the other original locators and co-owners of the mining claim, and Joseph H. Lobell was and had been for two years a co-owner and cotenant with

the heirs of George McManus and the other original colocators of the claim and was in possession as such cotenant, and at the time the deed was executed from Frederick J. Lobell to Joseph H. Lobell there was no change in the possession; in other words, Joseph H. Lobell did not take possession under the deed from Frederick J. Lobell, as he was already in possession of the claim with his other co-owners and cotenants, including the McManus heirs, in privity of title with them, and if any constructive entry under the Frederick J. Lobell deed can be implied in law it will be referred to the community of title then existing between the co-owners of the mining claim in the absence of evidence to the contrary, and there is not a particle of evidence of an ouster in this record. The ouster must be unequivocal in order to put the statute of limitations in motion against a cotenant, but what is there upon the face of the deeds to indicate that the undivided interest conveyed by one deed is not the same undivided interest conveyed by the other deeds? The deed from Cy Iba acting as attorney in fact for some of the colocators of the O'Glase claim to Victoria A. D. Johnson on February 18, 1890, purporting to convey an undivided one-half interest in the claim, is separated from the deed given by Ashcraft and Bedsaul to Cy Iba in March, 1900, by a period of ten years. The deed of the undivided interest from Ashcraft and Bedsaul to Cy Iba is separated from the deed of the undivided interest given by Cy Iba to Joseph H. Lobell by a period of five years. The deed of February 18, 1890, from Cy Iba to Victoria A. D. Johnson is separated from the deed of Victoria A. D. Johnson to Frederick J. Lobell, also purporting to convey an undivided one-half interest, but actually conveying only an undivided one-fourth interest, by a period of seventeen years; and the deed of Cy Iba purporting to convey an undivided one-half interest to Joseph H. Lobell is separated from the deed of Frederick J. Lobell conveying the Johnson interest to Joseph H.

Lobell by a period of two years. Deeds purporting to convey one-half undivided interests in a mining claim when executed years apart by different parties do not necessarily include the entire claim; and such deeds will not entitle the purchaser as against other co-owners and cotenants in common to the exclusive possession of any particular portion of the mining claim.

Noble v. Hill, 8 Tex. Civ. App. 171
 Long v. Morrison, 251 Ill. 143, 150
 Carpenter v. Fletcher, 239 Ill. 240
 Chapman v. Kullman; 191 Missouri, 237
 Parsons v. Sharpe, 102 Ark. 611
 Singer v. Nolan, 99 Ark. 446.

"The deeds to Finks were for undivided interests only. His entry under such deeds would not be tantamount to an ouster of his cotenants. The ouster must be unequivocal, in order to put the statute of limitations in motion against a cotenant. These deeds are simply for undivided interests, although, if they be added, they may pass interests in the land equaling the entire tract. But what is there upon the face of the deeds to indicate that the undivided interest conveyed by one deed is not the same undivided interest conveyed by the other deeds? Deeds conveying a half and two one-fourth interests in the survey, when executed by different parties, do not necessarily include the entire tract; and such deeds would not entitle the purchaser, as against other tenants in common, to exclusive possession of any particular portion of said survey."

Noble v. Hill, 8 Tex. Civ. App. 171

"It is contended that the execution and delivery of the deed of Annis Long, in 1893 of the entire premises amounted to an ouster of Virginia L. Morrison. We recognize the law to be, that where a cotenant conveys the entire premises to a purchaser who buys in good faith, and the grantee takes possession under such conveyance and pays the taxes and remains in the adverse possession of the en-

fire premises for the statutory period, he may thereby build up a good title by limitation, as against the cotenant of his grantor. (*Steele v. Steele*, 220 Ill. 318; *Waterman Hall v. Waterman*, 220 Ill. 569.) We are of the opinion, however, that doctrine cannot be invoked in this case to defeat the title of Virginia L. Morrison, for the following reasons: First, the grantees of Annis Long had been the cotenants of Virginia L. Morrison, and knew that Annis Long did not own the entire premises; second, the grantees in the deed were living upon the premises with the grantor at the time the deed was made and continued to so live until her death, and at the time the deed was executed and delivered there was no change in the possession,—in other words, they did not take possession under the deed; and third, at no time was the possession of the grantees adverse to Virginia L. Morrison, as the possession of the appellees was at all times for the benefit of themselves and Virginia L. Morrison, and they could not acquire a limitation title by reason of such possession, as against her.”

Long v. Morrison, 251 Ill. 150

Reed v. Bachman, 61 W. Va. 452, et seq.

“It is not sufficient that a cotenant continues to occupy the premises and appropriates to himself the exclusive rents and profits, makes slight repairs and improvements on the lands, and pays the taxes, for all of this may be consistent with the continued recognition of the rights of his cotenants. To constitute a disseisin there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the cotenants that adverse possession and an actual disseisin are intended to be asserted against them.”

Busch v. Huston, 75 Ill. 343

Ball v. Palmer, 81 Ill. 370

McMahill v. Torrence, 163 Ill. 277, 281

“In *Sontag v. Bigelow*, 142 Ill. 143, *Sontag* acquired the

title of one tenant in common to certain lands and by virtue of the title so acquired entered into possession of the premises. Afterwards there was a sale in partition of the whole of the premises, at which Sontag was the purchaser. After receiving this deed he appears to have remained in the possession of the premises and to have paid the taxes thereon for more than seven successive years, when the other tenants in common brought an ejectment suit against him. On the trial he offered in evidence the master's deed made under the partition sale. This deed was not relied on as title, but was claimed to be color of title. This was, apparently, because of some defect in the partition suit which was not pointed out in the opinion. The court held that while the evidence established color of title and seven years possession and payment of taxes, such title could not prevail against the cotenants because the possession was not adverse, and also because, having entered into possession of the premises as a tenant in common, he could not afterwards acquire color of title and invoke the aid of a seven years statute of limitations against his cotenants. The court said (p. 153): 'He therefore acquired possession of the premises as a tenant in common with the plaintiffs, and, occupying that position, he could not acquire color of title in 1874 and rely upon such title to defeat the plaintiffs.' "

Carpenter v. Fletcher, 239 Ill. 446

Sontag v. Bigelow, 142 Ill. 143

Nebraska has the same statute of limitations as Wyoming, and the Nebraska statute was construed by this Court in the case of Ward v. Cochran, 150 U. S. 597, a decision in which this Court defines the elements of an adverse possession necessary to give title by prescription under that statute. In that case the jury found a special verdict that defendant's possession under claim of title, was "open, continued, notorious and adverse," and the Court held that such verdict was insufficient to sustain defendant's title by adverse possession in failing to find that such possession

was actual and exclusive, the Court, after defining the essential elements of an adverse possession, saying:

“Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict, it was defective in two very essential particulars, in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title.”

Ward v. Cochran, 150 U. S. 597
 Armstrong v. Morrill, 14 Wallace, 120
 Clark v. Courtney, 5 Peters, 319
 Smith v. Algoma Lumber Co., 73 Oregon, 1
 Sommer v. Compton, 52 Oregon, 173

It is almost too plain to require the citation of authorities, that the mere purchase of the undivided interest of one cotenant and entry under such conveyance, does not amount to a disseisin which can ripen into a good title, since the grantee claims merely to succeed to the title of the granting cotenant.

Twitchell v. Rosiclair Lead Min. Co., 302 Ill. 365
 Busch v. Huston, 75 Ill. 343
 Long v. Morrison, 251 Ill. 143
 Patterson v. Miller, 241 S. W. 875
 Kathan v. Rockwell, 16 Hun. 90
 May v. Chesapeake Ry. Co., 184 Kentucky, 493
 Parsons v. Sharpe, 102 Ark. 611
 Singer v. Nolan, 99 Ark. 446
 Chapman v. Kullman, 191 Missouri, 237
 Gracey v. Fielding, 71 Florida, 1
 Packard v. Johnson, 57 California, 180

In cases of adverse possession, the knowledge of the hostile attitude of the possessor must be shown by proof so as

to preclude all doubt of the want of knowledge on the part of the owner.

Zeller's Lessee v. Eckert, 4 Howard, 289

Dubois v. Campau, 28 Mich. 313

May v. Chesapeake Ry. Co., 184 Kentucky, 493

The distinction between tenancies in common and other cases, in reference to adverse possession and the statute of limitations, and as to what is necessary to be done by one tenant in common before he can get title to any of the common property by adverse possession, is so ably and completely set forth in the concurring opinion of Judges Christiancy and Cooley in the case of

Dubois v. Campau, 28 Mich. 313

that there is nothing left to be said on the subject, and the principles there laid down by two of the greatest judges the United States have ever known, are conclusive of this case in favor of the plaintiff.

"An ouster between joint tenants, tenants in common, or co-partners may be affected by open, notorious and exclusive possession of the land by a stranger under a deed or an executory contract of sale, executed by one of the cotenants to such stranger, purporting to convey or sell the whole thereof, to the latter. Mere execution and delivery of such deed or contract is not of itself sufficient to work an ouster. To it there must be added express actual notice of the adverse claim and possession, or open, notorious, exclusive and hostile possession of the land by the grantee or vendee of which the true owner in cotenancy must take notice, and inquire by what right such dominion is exercised."

May v. Chesapeake & O. Ry. Co., 184 Kentucky, 493

White v. Beckwith, 62 Conn. 79

Sydnor v. Palmer, 29 Wis. 226-248

"The relation of trust and confidence is such between

cotenants that it would be inequitable for one of them to do anything to the prejudice of the others in reference to the common property. For one cotenant in any way but the most open and avowed, with the full knowledge of those in common interest with him, to try to obtain the common title has been held to be a breach of trust, amounting to a fraud against the rights of the cotenant. The only way to destroy a cotenancy is either for one to buy out the others, or to exclude them from participation therein, by such notorious acts of ouster, as amount to disseisin, and which has ripened by actual adverse possession into a perfected title under the statute of limitations. The present is not such a case."

Parker v. Brast, 45 W. Va. 399
 Reed v. Bachman, 61 W. Va. 452
 Patterson v. Miller, 241 S. W. 875

Where a defendant claimed by adverse possession the entire title to the land which it had previously owned in common with plaintiff, who had been in rightful possession, the burden was on defendant to prove that its possession was accompanied by tortious and disloyal acts to plaintiff, which were open, continued and notorious, so as to preclude all doubt as to the character of the holding or the want of plaintiff's knowledge that it was adverse.

Rich v. Mining Co., 147 Fed. 381-87, 77 C.C.A. 588

A recorded deed purporting to convey the interest of the deceased cotenant is not notice to his heirs. The rights acquired by inheritance are not susceptible of registration, and our statutes that relate to recorded instruments, and the consequent notice, that results from such records, cannot in the nature of things, apply to such a claim.

The occupancy by one tenant of the common premises, however long continued, is no evidence of the ouster of a cotenant. To constitute disseisin there must be an open and notorious act of an unequivocal character, clearly indicating

an assertion of ownership of the entire premises, to the denial and exclusion of the right of the cotenant.

Rich v. Victoria M. Co., 147 Fed. 380, 77 C.C.A. 558

Youngs v. Heffner, 36 O. S. 232

Koltenbrock v. Cracraft, 36 O. S. 588

The Ohio Statute of Limitations is the same as the Wyoming Statute except as to the number of years within which an action shall be brought, and it has been construed by the Supreme Court of the U. S. in the following case:

Ewing v. Burnett, 11 Peters, 49, 9 L. Ed. 624

To the effect that all the elements of adverse possession must coexist for the entire time fixed by the statute in order to sustain a plea of title by adverse possession.

One tenant in common occupying the estate does not oust or disseise another tenant in common, or one who claims to be such, without some unequivocal act manifesting an intention to do so. There must be some open, notorious and unequivocal act of exclusion.

Zeller's Lessee v. Eckert, 4 How. 289

Forward v. Deitz, 32 Pa. 69, 73

Van Bibber v. Frazier, 17 Md. 436, 451

Peck v. Ward, 18 Pa. 506

Newell v. Woodruff, 30 Conn. 492

Meredith v. Andres, 7 Ired. 5 (N. C.)

Andres v. Andres, 9 Ired. 214 (N. C.)

Burns v. Byrne, 45 Iowa, 285

Winsett v. Winsett, 83 So. 117

Rothwell v. Dewees, 2 Black, 613

Edwards v. Bishop, 4 N. Y. 61

Chapman v. Kullman, 191 Missouri, 237

Holley v. Hawley, 39 Vt. 525

Thornton v. Bank, 45 Me. 158

Sydnor v. Palmer, 29 Wis. 226, 248

No silent possession by one cotenant for any length of time will divest the right of another cotenant who is absent from the premises. The occupying tenant must let him know he claims in hostility. The character of the hostile

possession must be brought home to the absent cotenant. It must be inconsistent and incompatible with the incidents of occupation as cotenant.

Barr v. Gratz, 4 Wheat. 213
 McClung v. Ross, 5 Wheat. 117
 Reed v. Bachman, 61 W. Va. 452
 Gracey v. Fielding, 71 Florida, 1
 Pillow v. S. W. Co., 92 Va. 144
 Justice v. Lawson, 46 W. Va. 163
 Grand Tower Co. v. Gill, 111 Illinois, 541
 Stevens v. Wait, 112 Ill. 544
 Moore v. Antil, 53 Iowa 612
 Curtis v. Barber, 131 Ia. 400
 Hunnicutt v. Peyton, 102 U. S. 333
 Reaffirmed in Marine Ry. Co. v. U. S. 257 U. S. 47

Actual knowledge of the rights of George McManus and his heirs in the property by both the defendants is explicitly alleged in the bill, (R. 18.) and admitted by the motions to dismiss, and on this record they cannot be heard to deny that knowledge. Furthermore, being subsequent purchasers, they are charged with knowledge of all the facts that the record of their title discloses, and the record showed to the defendants that their grantors and George McManus and his heirs were all co-owners and tenants in common of the O'Glase placer mining claim, and that the defendant the Federal Oil & Development Company was purchasing an undivided interest in the claim, from the co-owners and tenants in common of George McManus and his heirs. In the bill of complaint (and they are bound by its allegations on this appeal), there is not a single fact alleged showing any act on the part of the Federal Oil & Development Company adverse and hostile to the title of George McManus and his heirs until after the granting of the oil lease on April 1, 1921. (R. 19.) Neither have the rights of third parties intervened and attached. The defendant The Mountain & Gulf Oil Company is not an innocent purchaser for a valuable consideration of its interest in the oil lease,

which was an assignment to it of a working interest in the lease, on the basis of paying to the defendant the Federal Oil & Development Company forty per cent of the net proceeds derived from the oil and gas produced from said leased premises, and when it entered into that arrangement it had knowledge and notice of the rights of the heirs of George McManus in the premises. (R. 18.)

In the fact that an application was made for a patent to the O'Glase claim by the defendant the Federal Oil & Development Company on May 15, 1918, there was nothing to indicate to the heirs of George McManus that the intention was to acquire a title adverse to them.

Nowell v. McBride, 162 Fed. 432, 441 (9th CCA)

Ballard v. Golob, 34 Colorado, 417

Adverse proceedings on this application for patent were ordered by the Interior Department on December 8, 1919, but the application for patent was later withdrawn and the case closed on March 25, 1920. (R. 10-11.)

THE CASES CITED BY THE DEFENDANTS ON THE
STATUTE OF LIMITATIONS ARE NOT IN POINT
IN THE INSTANT CASE

Defendants, in order to uphold their plea of laches, seek by desperate assertions to show that the statute of limitations has run against plaintiff's rights. Although the case was heard on a motion to dismiss, which admits all facts well pleaded, and facts are well pleaded in the bill of complaint showing the unbroken existence of a cotenancy between the plaintiff and defendants and their grantors and predecessors in interest, the defendants assert that neither they, nor their grantors, have ever recognized the existence of a cotenancy or the relation of tenants in common with George McManus.

In taking this position they utterly ignore, not only some, but all of the allegations of the bill, and, stranger still, they ignore and forget their own actions in making application for, and obtaining, the oil lease in controversy, and take no cognizance of the law under which they obtained the lease. They forget that their application for lease was based on the location by George McManus and his seven co-locators of the O'Glase oil placer mining claim, on the 11th day of January, 1887, and its maintenance as a valid and subsisting location up to the time of the application for the lease by the locators and their grantees; they have forgotten that they could not have applied for and obtained a lease on the Southeast Quarter of Section 13, Township 40 North, Range 79 West, under the O'Glase location, without recognizing and admitting their privity with the title of George McManus and his successors in interest. The location of the O'Glase placer mining claim by George McManus is the very inception and foundation of their title to the lease they now hold, as much so as it is the inception and foundation of the plaintiff's title to an undivided one-eighth interest in the lease held by the defendants; they

forget that there have never been any forfeiture proceedings taken by them, or their predecessors in interest, under Section 2324 of the Revised Statutes of the United States; they forget that in their application to the Department of the Interior for the lease they now hold they alleged that they held the entire title to the O'Glase placer claim, including the interest of George McManus, by purchase, and not by adverse possession or prescription; they forget that it is declared by the statute (Section 2324) and held by all the courts that have ever considered the matter, that the location of a mining claim on the public domain by several locators creates the relationship of tenancy in common or cotenants, between the colocators, and that the grantees of any and all the locators of an associated oil placer mining claim succeed equally to the rights and obligations of their grantors in the premises; they forget that a quit-claim deed by one cotenant purporting to convey an undivided one-half interest, does not set the statute of limitations in motion against the cotenants; they forget that when a stranger to the title purchases an undivided one-fourth interest, or any interest less than the whole, in a placer mining claim located by eight persons, he ipso facto becomes a cotenant with the holders of the other undivided interests; they have forgotten that different persons cannot hold an interest in severalty in an unpatented placer mining claim under the laws of the United States; they have forgotten that the condition precedent for locating and holding an association placer mining claim under the laws of the United States is that the locators become the owners of an undivided interest in common immediately upon the completion of a valid location, and that so long as the claim is held by several owners they are, by virtue of that ownership, cotenants and that the statute, Rev. Stats. Sec. 2324, declares that the owners of an unpatented mining claim are owners in common; they have forgotten that another quit-claim deed given by another cotenant, Victoria A. D. Johnson, to Fred-

erick H. Lobell, two years later than the deed from Cy Iba to Joseph H. Lobell, purported to convey only an undivided one-half interest in the O'Glase placer claim; they have forgotten that there is nowhere in the bill of complaint a word or sentence showing that Lobell made any entry into the possession of the O'Glase placer claim other than as the owner of an undivided one-half interest, and that his entry is referable to, and presumed in law to be under his first deed purporting to convey an undivided one-half interest, and in the absence of any facts shown to the contrary, such entry is presumed to be in amity with his cotenants; they have forgotten that the very fact that they entered and did the annual assessment work on the O'Glase placer claim under the location made by George McManus and his colocators, operated under the law to make them tenants in common, and that such fiduciary relation could only be terminated by an open and positive disavowal of that relationship, manifested by an actual, exclusive, notorious, hostile and adverse possession for a continuous period of ten years, and there is not a syllable in the bill of complaint in this action from which such an ouster and continued adverse possession of the claim as against the other co-owners can be even inferred, much less conclusively presumed; they forget that their direct grantor, having entered as a tenant in common with George McManus under the deed from Cy Iba, acknowledged the legal relationship established by the law between himself and the other locators, and could not turn a peaceful and amicable entry into an adverse holding without bringing knowledge of such adverse claim, if any was ever made prior to the application for lease, home to his cotenant, whom he seeks to disseise; they forget that the performance of the annual labor upon an unpatented mining claim by one locator, or owner, inures to the benefit of all his colocators and co-owners under the law, and this startling fact, alone, shows that the right of possession of an unpatented mining claim is held

in common by each for the benefit of all, the essential element of a tenancy in common, and is so declared by the statute, Rev. Stats. U. S., Sec. 2324, declaring them to be owners in common of the claim.

This strange hiatus in the memory of the defendants as to the source of their title, and their total disregard of the facts pleaded in the bill of complaint, perhaps accounts for their citing the cases they do as authorities on the question of the statute of limitations, which they attempt to raise in his case as the basis of their plea of laches. We have selected from the vast number of cases cited by counsel for defendants on this proposition a few that are typical of all the rest, for the purpose of showing that they have no application to the facts pleaded in the case at bar. They are as follows:

- Bradstreet v. Huntington, 5 Peters, 402, 442
- Elder v. McClaskey, 70 Fed. 529
- Clapp v. Bromagham, 9 Cow. 530
- Wright v. Sperry, 21 Wis. 336
- Shelby v. Rhodes, 105 Miss. 255
- Steele v. Steele, 220 Ill. 318
- Joyce v. Dyer, 189 Mass. 64
- Sands v. Davis, 40 Mich. 14, 18
- Illinois Steel Co. v. Budzsiz, 139 Wis. 281
- McCann v. Welch, 106 Wis. 142
- Craven v. Craven, 68 Neb. 459
- Phipps v. Behr, 224 Mass. 342
- Ames v. Howes, 13 Ida. 756

None of those cases have any application to the case at bar. They were all cases involving the actual adverse possession by the defendants of premises covering the statutory period of limitations, in which entry had been made under deeds purporting to convey the whole property and the whole estate therein by one of the cotenants, and did not purport to convey an undivided interest.

In *Bradstreet v. Huntington*, 5 Peters, 402, 442, the jury found as a fact:

1. That the adverse claimant, Potter, entered into the actual, exclusive and adverse possession under a warranty deed conveying, or purporting to convey, the entire tract of land and the whole fee in the land, with covenants of warranty expressly against the plaintiff's title.

2. The jury further found that the defendant had held this exclusive, actual and adverse possession for a period of over thirty years, claiming to be the sole and exclusive owner against all the world.

3. The case was governed by the common law rule that a grantor out of possession could convey no title by his deed, hence Jackson's grantor received no title by the conveyance from Schuyler made four years after the defendant's grantor entered on the actual adverse and exclusive possession of the land.

4. The deed to Jackson's grantor, Bradstreet, not conveying any title, she was not a tenant in common with Potter.

5. The Court admits that Schuyler's deed did convey an equitable title to Jackson's grantor, and thus created an equitable cotenancy, but that this equitable cotenancy was not available to the plaintiff in an action in ejectment in a Federal Court.

6. The Court admits that they decided the case on the black letter of the common law as adopted in the State of New York.

7. The Court animadverts on the fact that the bill of exceptions settled and filed by the plaintiff in error states "that the defendant *proved* that Potter entered under his deed, and by virtue thereof, immediately after its execution, claiming to be the *sole and exclusive owner* of the land," and that those *proved facts* were altogether inconsistent with an entry by Potter for the use of himself and another.

8. The case did not arise under the mining laws of the United States, which were not enacted until 1806.

9. The doctrine that locators and co-owners of an un-

patented mining claim are tenants in common in the fullest sense of that term, and trustees of the title for each other, to the extent that any title acquired by one inures to the benefit of all, is so firmly established by the decisions of this Court, the Circuit Courts of Appeal, and the various State Supreme Courts that have considered the question, as one of the fundamental principles of the mining law, that it cannot be shaken by a decision made in the year 1831, as to what constitutes a disseisin and adverse possession under the common law, that was *indisputably proved by the evidence in that case*.

10. When the annual assessment work is done on an unpatented mining claim by one locator or co-owner it inures to the benefit of all, and the one doing the work, if he desires to be paid for his outlay by his locators or co-owners, has the remedy of forfeiture proceedings, given him by the statute, but the doing of the annual labor by one of the locators or co-owners, without taking forfeiture proceedings against one who has failed to pay his proportion of the annual assessment, does not constitute an adverse possession. Its legal effect is the very antithesis of adverse possession. The failure of the co-owner, doing the annual assessment work, to take forfeiture proceedings against a co-owner who has not contributed his share of the annual assessment, is strong evidence that he is not asserting any adverse claim to the interest of his delinquent cotenant.

In *Elder v. McClaskey*, 70 Fed. 529, the statute of limitations had run against the title of the ancestors before it descended to the heirs, and *the proved facts* negatived the existence of a cotenancy. That was a case where an adverse entry was made under warranty deeds purporting to convey the absolute title and entire tract of land, and not an undivided interest therein, and that entry was followed by actual, exclusive, continuous, hostile, and notorious possession by hundreds of successive grantees for a period of 47 years

under a source of title hostile to the claimants' title in that case, all of *which facts were proved by the evidence, and the deeds the adverse holders took from the cotenants of the claimants expressly recited that they held the land adversely, and taking such deeds was an assertion of an adverse holding by the grantees from their delivery.* See the statement of facts in that case made by Circuit Judge Taft, 70 Federal, pp. 532-3-4-5-6-7.

In the case of *Clapp v. Bromagham*, 9 Cowen, 530, the evidence showed that there was an actual, exclusive and adverse possession of the premises by one cotenant and his grantee claiming the whole of the premises for a period of twenty years. In its opinion in that case the Court for the Correction of Errors of the state of New York said:

"Now the bill of exceptions clearly shows, that the fact of the sale and exclusive possession of the farm by Clapp, the defendant below, as the *absolute owner of it*, claiming the title adversely to the petitioners for more than twenty years without interruption, claim or disturbance by them, *was fully proved*; and it was assumed, and in terms, conceded by the court below, on their decision of the case. That fact, therefore, not having been drawn in question, cannot be contended to have been passed upon by the jury. It was the legal effect of that fact upon this case that was a point in dispute between the parties . . . Peter was in possession at the time of his father's death, and set up a claim to the whole estate, not by descent as heir to his father, but as purchaser or otherwise against the descent, and it is at least questionable whether his entry disclaiming all title by descent, and insisting upon a distinct title, would accrue to the benefit of the other coparceners. But if it did, *his subsequent acts and avowed claim of the whole*, and entire exclusion of the coparceners from all participation in the use of it, or the rent and profits of it, and his sale to Clapp, with the entry and sole possession of Clapp as owner, were the highest and most equivocal acts of disseisin, at any rate of

adverse possession, that could possibly be done. Peter, in the first instance, and Clapp afterwards entered for himself, *exclusively claiming the whole*, and the sale by Peter to Clapp was perfectly decisive of the character of his entry, and the exclusive nature of his possession."

The case of *Wright v. Sperry*, 21 Wis. 336, was an action of ejectment. The plaintiff claimed under a foreclosure sale, in December, 1859, and also under tax deed made to one George W. Wright on March 27, 1861, on a sale in 1857, for taxes of 1856. In that case the decision was that a tenant in common could buy an outstanding title where his possession of the whole property under a claim of the whole was actual, exclusive and adverse for the period of the statute of limitations, the court saying:

"After an eviction of the tenants in common by the paramount title, either of the tenants may then purchase in such title for his exclusive benefit. If one tenant in common conveys the whole estate, and the grantee enters into the conveyance claiming the whole premises, such entry and possession are adverse, and constitute a disseisin of the cotenants. Although the entry of one tenant in common, *co nomine*, is the entry of both, yet if one enter claiming the whole, and continue in possession of the whole, keeping his cotenants out, such entry and possession are adverse; and from the time of the commencement thereof the statute of limitations begins to run against his cotenants . . . We will now apply these principles to the point under consideration. Sperry and wife conveyed, by way of mortgage, with covenant of warranty, the *whole* of the land to the mortgagee. This mortgage was foreclosed, and *all* the land was sold by virtue of the judgment of the court; and the purchaser at that sale purchased the *whole*, and received a deed of the *whole*, and conveyed the *whole* to the present plaintiff. The presumption is that he and his grantor claimed the *whole*, and intended to hold the *whole*; and this *Sperry and wife knew*; for they first conveyed the *whole* of

these premises and were parties to the foreclosure action. The purchaser at the foreclosure sale had the right of immediate possession of all the premises, and might have had a writ of assistance to put him in possession; and if he had taken actual possession, it would have been adverse to the cotenants who afterwards conveyed to Mrs. Sperry." (Italics by the Supreme Court of Wisconsin.)

The case of *Shelby v. Rhodes*, 105 Miss. 255, was a suit for partition by one Russell B. Shelby against W. L. Rhodes and others. From a decree dismissing the bill, complainant appealed. The facts in that case as stated by the court were as follows:

"The material facts are that on the 14th day of April, 1887, E. A. Lindsley, purporting to act as attorney in fact for L. B. Lindsley, the then owner of the land, executed a deed thereto to Mrs. Mary E. Shelby, which deed, for reasons not material to the question here involved was void. Mrs. Shelby died intestate in June, 1890, leaving as her heirs at law her husband, W. W. Shelby, and one son, Russell B. Shelby, appellant, who was then a minor. In March, 1898, appellee, W. L. Rhodes, purchased the land from W. W. Shelby thinking he was the sole owner thereof, receiving from him a warranty deed, under which he entered into and has since continued in exclusive possession of the land. In 1902, Russell B. Shelby, being then still a minor, and L. B. Lindsley, (the real owner of the property) for a consideration of \$1 executed and delivered to Bessie T. Rhodes, the wife of W. L. Rhodes, a quit claim deed to the land, which the appellee sets up in bar of appellant's title."

After thus stating the facts the Supreme Court of Mississippi continued:

"Pretermittting any discussion of appellee's contention that W. L. Rhodes never became a tenant in common with appellant, for the reason that the deed to Mary E. Shelby which appellant claims constituted the source of their common title, is not merely defective, but is void, and treating

W. L. Rhodes as in law a tenant in common with appellant, since he in fact never admitted any such relation *and entered into the exclusive possession of the whole of the common property, claiming under a deed which conveyed to him the whole of it, and not an undivided interest therein, it can hardly be said that such a confidential relation existed between him and appellant as to make it inequitable for him to purchase the outstanding title and thus obtain what he intended and thought he had obtained in the first instance by his purchase from W. W. Shelby, to-wit, a perfect title to the property. For the same reason it cannot be said that it was inequitable for his wife to purchase this outstanding title."*

From the statement of facts given above it is plain that the case of *Shelby v. Rhodes* involved a contest between two persons, one of whom never had any interest or title in the premises, and one who obtained the entire title to the premises from the real owner, and not an undivided interest therein, by a subsequent deed, and the Mississippi Supreme Court correctly held that the prior claim of W. L. Rhodes under W. W. Shelby, who claimed to be one of the owners of the premises, as one of the heirs of his wife, who claimed the title to the premises under a void deed, did not estop W. L. Rhodes or his wife, Bessie T. Rhodes, from purchasing the outstanding title. This was necessarily so, as the void deed conveyed no estate, title or interest to the mother, and therefore none devolved upon the father and son by descent, and hence as they never shared any interest or title the relation of tenants in common could not be created.

The following quotation from the opinion in the case of *Steele v. Steele*, 220 Ill. 318, sufficiently differentiates it from the instant case, and shows its utter inapplicability as an authority in the case at bar.

"But whatever the fact was to the equitable title to the land, *the action was barred by statutes of limitation.* Henry Vick-

erman and William J. Steele had been in possession and paid all taxes under claim and color of title acquired in good faith for 15 years before the commencement of the suit, and James Steele Jr. had been in possession of the 3-acre tract for 13 years under like claim and color of title, and had paid the taxes. *A sale and conveyance of the whole title to a tract of land by one cotenant, followed by adverse possession*, amounts to an ouster or disseisin of the other cotenants, and the statute of limitations will bar their entry or action. There is no dispute of the facts that said defendants purchased and paid for the property and received conveyance of the same, and had been in the open, notorious and exclusive possession of the premises for the period stated. Said defendants and their grantors had also been in the open and exclusive possession of the premises for more than 30 years after the youngest complainant reached her majority, and during all that time applied the rents and profits to their own use, and treated the property in all respects as their own, and *such facts constituted a complete defense under the 20 year statute of limitations*, unless there is some valid reason why a statute of limitation cannot apply."

In the case of *Joyce v. Dyer*, 189 Mass. 64, the disseisor entered under a deed to the whole of the property, and continued in the open, peaceable, continuous, exclusive, and adverse possession of the property for thirty-six years, using it as a dwelling place and cultivating it, and his son continued this possession from 1865 down to 1904, without any claim being made against it. The mother of the plaintiff acquiesced for more than sixty years before her death in such possession, living during all that time near the property.

Sands v. Davis, 40 Mich. 14, 18, was a case in which Sands had received a deed from one cotenant of the property purporting to convey to Sands the entire title, in 1867. Sands entered under his deed into the exclusive and actual pos-

session of the property, claiming the entire title. Previous to the purchase by Sands in 1867, the land had been sold for taxes in the years 1863 and 1864, and Sands bought in these tax titles in 1877 and 1878, and asserted his right under those tax deeds in that suit. Thus Sands although in fact receiving by the conveyance from Filer only an undivided interest in the property, entered adversely, claiming the entire title as Filer had done before him, and when he purchased the tax titles ten years afterwards he was not estopped from asserting the title he procured by them, the Supreme Court of Michigan saying:

"The testimony in this case tended to show that Filer claimed to own the land, when he deeded it to Sands, and that Sands had entered as claiming the entire title."

"A purchaser from one who holds but an undivided interest in patented lands is not estopped from setting up an adverse claim which originated before his purchase, against the remaining cotenants of the other undivided interests."

Sands v. Davis, 40 Mich. 14, 18

None of the foregoing cases is in point as an authority against the plaintiff in the instant case. And Sands v. Davis must be taken to have been silently overruled by the later case of Richards v. Richards, 75 Michigan, 408, heretofore cited in this brief.

Illinois Steel Co. v. Budzsiz, 139 Wis. 281, is a case based on a statute making entry under color of title, and possession thereunder for ten years, sufficient, in the absence of rebutting evidence, to raise the presumption that the possession for such period has been characterized with all the essentials of disseisin of every other claimant of the property; in other words, proof of such color of title, and possession thereunder, is presumed to be actual, exclusive, continuous, notorious and hostile to all the world, in the absence of countervailing evidence. There is no such statute in the State of Wyoming, and no allegations in the bill of complaint raising such a presumption in the instant case.

McCann v. Welch, 106 Wis. 142, was an action under the Wisconsin statute barring actions for the recovery of real estate after ten years of adverse possession under a written instrument. In that case the actual and adverse possession of the defendant for ten years was not disputed. The only contest was over the question of occupancy in good faith, and the Court held that good faith was not a necessary ingredient to a title by adverse possession under the Wisconsin statute. And in addition, *the defendant entered under a deed purporting to convey the entire estate in the premises.*

Craven v. Craven, 68 Neb. 459, was also a case of a conveyance to one cotenant of the entire estate by one claiming a paramount title, and the adverse possession thereafter of the premises under two recorded leases from the purchasing cotenant for a period of more than ten years by the party who conveyed the paramount title to the cotenant, was properly held to be an open denial of the title of the other cotenants and sufficient to set the statute in motion.

Phipps v. Behr, 224 Mass. 342, must have been cited by counsel for defendants under a mistake, as the Supreme Judicial Court of Massachusetts held in that case that the mere giving of a deed was not sufficient to establish a title by adverse possession, but, in addition thereto, actual and exclusive possession of the premises for the statutory length of time, accompanied by notorious acts indicating an adverse claim of title, must be proved, and were proved in that case. The Massachusetts Court, in its opinion, *distinctly states the facts, which were proved, showing a proper case of adverse possession, and distinctly holds that the statute of limitations can only be set in motion against a cotenant by a deed conveying the entire interest in the locus, where a constructive ouster of a cotenant is relied upon, which is the only ouster the defendants rely, or can rely, upon in the case at bar.*

The case of Ames v. Howes, 13 Ida. 756, is a curious non sequitur. The Court in that case held that "it is well settled that the possession of one tenant, asserting an *exclusive*

right to the land under a deed conveying the land to him by specific description, is adverse to cotenants having notice of the deed. The registration of a deed under which a tenant in common claims *exclusive right* to the land is notice thereof to a cotenant." But it decided the case actually on the proposition that it was an action to recover an undivided interest from a defendant, who, in fact, had no title to the interest sought to be recovered, and therefore a judgment could not be rendered against the defendant, compelling him to convey an interest he did not own or possess. See 93 Pac. p. 58, showing the real ground on which the Court based its judgment.

King v. Carmichael, 35 N. E. 509, is as different from the instant case as water is from wine, as shown by the following syllabi:

"1. If one enters under color of title, *into full, open, notorious and exclusive possession of land* in which another has an undivided interest, *claiming the whole himself*, his title will be adverse to his cotenant."

"2. A deed from one of several cotenants *to a person in exclusive, adverse possession, conveying absolutely all the property*, does not make the grantee a cotenant with the holders of the legal title, and so render his possession not adverse."

In the lower court the defendants on the question of limitations also cited the following cases:

- Larman v. Huey's Heirs, 13 B. Mon. 436
- Clymer v. Dawkins, 3 How. 674
- Blankenhorn v. Lenox, 98 N. W. 556
- Liddell v. Gordon, 241 S. W. 750
- Virginia Coal & Iron Co. v. Hylton, 79 S. E. 338
- Soper v. Lawrence Bros. Co., 56 Atl. 908
- Abernathie v. Cons. Va. Min. Co., 16 Nev. 269
- Waterman v. Moody, 103 Atl. 325.

But an examination of all these citations shows that they are all cases where the adverse claimant entered under a deed conveying, or purporting to convey, the entire title

and estate in the property, followed by proof, on the trial, of all the essential elements of an adverse possession for the required statutory time, thus destroying the relation of tenancy in common. There is nothing of that kind in the instant case.

THE HEIRS OF GEORGE McMANUS WERE NOT
CHARGEABLE WITH CONSTRUCTIVE NOTICE
OF THEIR RIGHTS IN THE PREMISES

The defendants contend that the heirs of George McManus were guilty of laches in that for aught that appears on the face of the bill, the widow and heirs of McManus could have learned of their rights at any time they had chosen to inquire or to examine the public records; that by the use of the commonest sort of diligence they might have ascertained within a few weeks after the death of McManus, by an examination of the public records, the very facts which they discovered twenty years later. The defendant means by this that the heirs of George McManus had constructive notice of their rights through the public records. Nothing could be further from the fact. The public records gave the heirs of George McManus no information or knowledge of any kind that would have led to the discovery of his interest in this mining claim. If they had lived in Natrona County all their lives, and visited the office of the Register of Deeds and County Recorder every day, they would never have found the name of George McManus recorded there as a colocator and co-owner of the Southeast Quarter of Section 13, Township 40 North, Range 79 West, and known as the O'Glase oil placer mining claim, or of any other mining claim, for the very good reason that the name of George McManus did not appear on those records as a colocator or co-owner of said mining claim until February 18, 1922. (R. 2-3-4-6-8-11-12.) The O'Glase oil placer claim was located by George McManus under the name of George *McManes*. (R. 2-3-8.) The name George *McManes* appears upon the location notice posted upon said placer claim, and in the location certificate thereof filed and recorded in the office of the Register of Deeds of Carbon County, Wyoming Territory, and Natrona County, Wyoming. (R. 2-3-8.) George McManus died intestate in Sep-

tember, 1901, and there has never been any administration on his estate. His widow and daughter were citizens and residents of the states of Nebraska, Kansas and Iowa during all the time from January 11, 1887, down to and until the commencement of this action, and the widow and heirs never knew of his use of the name "*McManes*" in the location and holding of said O'Glase oil placer mining claim. An examination of the public records would have disclosed nothing indicating to them that their husband and father George McManus, was a colocator and co-owner of the claim. The defendant the Federal Oil & Development Company went to those public records, and from what it found there based its application for the oil lease on the mining claim in controversy in this action on the location certificate of the O'Glase oil placer mining claim found in those records containing the name of "*George McManes*." (R. 8.) The name "*McManes*" is not the same as the name "*McManus*." The record must conclusively give notice, or there is no constructive notice. Neither are the names "*McManes*" and "*McManus*" idem sonans, and even though they were, it would not avail to constitute constructive notice, as the record speaks to the eye and not to the ear. Thus, even though we assume that the heirs of George McManus had examined the records, and where and when they did so found the name of George *McManes* they were not, under the law laid down by all the cases, required to inquire further as to the possibility of "*McManes*" being "*McManus*."

In the Alabama case of *Johnson v. Wilson & Co.*, 137 Alabama, 468, it was held that the record of a chattel mortgage in the name of "*A. W. Dixon*" is *not* notice that "*J. W. Dixon*" executed it, the Court saying:

"Both claim to have derived their title from one J. W. Dixon, and both by virtue of mortgages executed by him. The defendant acquired his mortgage on December 10, 1900, which was filed for record on the 14th day of the same

month. The signature to that mortgage is 'A. W. Dixon,' although it was in fact executed by 'J. W. Dixon.' The plaintiff's mortgage was executed in the spring of 1901, and executed by Dixon in his true name. It is not contended that the plaintiff had actual notice of the defendant's mortgage, or that they are not purchasers for value. The question is, are they chargeable with constructive notice of the mortgage held by the defendant by reason of the recordation? 'Conveyances of personal property to secure debts or to provide indemnity are inoperative against creditors and purchasers without notice until recorded.' etc. Code 1896, Section 1009, and the recording of such a conveyance in the proper office operates as a notice of its contents. Code 1896, Section 901. It may be, and doubtless is, true that the mortgage executed by J. W. Dixon to the defendant under the assumed name of 'A. W. Dixon' is a valid conveyance inter partes; but does it follow from this that the plaintiffs, who subsequently purchased it from Dixon under his true name, are chargeable with constructive notice of the mortgage, which was recorded correctly? In other words, the record of a mortgage executed in the name of 'A. W. Dixon' is not notice that J. W. Dixon executed it. The names are as entirely different as are the names of J. W. Dixon and J. W. Smith. Had Dixon assumed the name of 'J. W. Smith,' and executed the mortgage, signing that name instead of his true name, it could hardly be doubted, although he bound himself, that the record of it would not have operated as notice to the plaintiff."

Johnson v. Wilson & Co., 34 So. 302, 137 Ala. 608

Mackey v. Cole, 79 Wis. 426

Phillips v. McCaig, 36 Neb. 853

In the case of *Hess v. Johnson*, 9 L. R. A. 471, 475, the Supreme Court of Indiana held that the record must conclusively create notice, or there is no constructive notice, the Court saying:

"The appellant was chargeable with the fact that the appellee company held a judgment against William Mankedick, and of the amount and terms and conditions of the judgment, but nothing more. He was not chargeable with notice that his remote grantor, H. W. Mankedick, and the William Mankedick named in the judgment was the same person. The judgment did not disclose this fact, nor did it suggest inquiry which 'would have led up to' an ascertainment of the fact. For all legal purposes the full name of the appellant's grantor was Henry Mankedick. The middle name was not important and suggested nothing. As a question of law, the notice which was carried to the appellant was that he held title through Henry Mankedick, and that the appellee held a judgment against 'William Mankedick.' But if it had occurred to the appellant that 'William Mankedick,' the judgment debtor, and 'H. W. Mankedick,' the remote grantor, were but two names for the same person, there was nothing in the records to suggest to him where he could acquire the information. There was nothing to suggest to the purchaser that the judgment creditor had such knowledge; he had a right to assume to the contrary. As the judgment had been taken against 'William Mankedick,' he had the right to assume that the creditor had taken judgment against the debtor by his baptismal name."

Hess v. Johnson, 9 L. R. A. 475, 476; 25 N. E. 444

In the case of *Crouse v. Murphy*, 140 Pa. 355, 21 Atl. 358, the Court held that where the record title was in the name of Daniel J. Murphy a judgment against "Daniel M. Murphy" did not attach to defeat a purchaser who, subsequent to the judgment and in ignorance thereof, bought from the judgment debtor by deed taken in the name of "Daniel J. Murphy," the Court saying:

"It is not enough that the names are *idem sonans*. In *Hall's App.*, 40 Pa. 452, the true name of the defendant was 'George P. Yost.' It was entered on the index against 'George P. Jost.' The first name was right. The last name

was identical with the right name of the defendant, but it was held that the purchaser had no notice of the lien from the record. The reason evidently is that the record addresses itself to the eye, and not to the ear alone. The purchaser was bound to look under the letter 'Y,' which was not the initial letter of the vendor's name. Not finding a lien there, he was not bound to go further, and the lien was postponed."

Crouse v. Murphy, 140 Pa. 355, 21 Atl. 358
 Zimmerman v. Briggans, 5 Watts & S. 186
 Wood v. Reynolds, 7 Watts & S. 406
 Turk v. Benson, 30 N. D. 200
 Wicker v. Jenkins, 49 Tex. Civ. App. 366
 1st Nat. Bank v. Hocoda Co., 169 Ala. 476

In the case last above cited it was held:

"That the recording of a mortgage signed 'W. J. McDonald' was not constructive notice of the fact that the mortgage was executed by 'W. N. McDonald.'"

In the case of Bankers Loan Co. v. Blair, 99 Va. 606, 39 S. E. 233, it was held that obtaining a judgment against "Mrs. T. Frank Simmons" and indexing that judgment in the judgment lien docket in the name of "May M. Simmons, who is claimed to be Mrs. T. Frank Simmons," was not constructive notice that it was a lien upon a house and lot standing upon the record in the name of "May M. Simmons," the Court saying:

"The trustee in the deed of trust and the appellant were chargeable with notice of the fact that the assignor of the appellee, Miss Blair, held a judgment against Mrs. T. Frank Simmons, and of the amount, terms and character thereof; but they were not chargeable with notice that May M. Simmons, the grantor of Mrs. Downey, and Mrs. T. Frank Simmons, named in the judgment, and in whose name it was docketed, were the same person. The judgment did

not disclose that fact, nor did it suggest any fact that would have led up to that fact."

Prouty v. Marshall, 225 Pa. 570

Lessee of Jennings v. Wood, 20 Ohio, 363, 366

The following syllabus was written by the Supreme Court of the state of Nebraska in the case of Phillips v. McKaig, 36 Neb. 853, 55 N. W. 259:

"1. The party's true name was Mary Ann Allely, and she held her real estate by conveyance of record under the name of Mary A. Allely. Held, that a judgment against her, indexed and docketed in the office of the clerk of the district court, 'McKaig & Company vs. May Alley,' was not constructive notice to a purchaser of the real estate from Mary Ann Allely.

"2. The indexes in the office of the register of deeds disclosed conveyances as follows: '——— to Mary A. Allely, deed. Mary A. Allely to Hooper, mortgage. Mary A. Allely to Vickars, mortgage.' Held that Vickars, by taking a deed of the real estate from Mary A. Allely, so described in body and acknowledgment of the deed, but signed 'Mary A. Alley,' was not thereby charged with notice that a judgment indexed in the office of the clerk of the district court against May Alley was against Mary A. Allely."

A judgment indexed against one by the first name of "Ellen," is not notice to one who purchases the land of a person using the first name of "Helen."

Thomas v. Desney, 57 Ia. 58

There is another reason also why the heirs of George McManus were not charged with constructive notice of anything appearing in the public records of Natrona County, and that is that such records, by statute, are not notice to the holders of antecedent rights but are only constructive notice to subsequent holders. The Statutes of Wyoming concerning constructive notice, and this mining claim is within that state, is as follows:

"Each and every deed, mortgage, instrument or conveyance touching any interest in lands, made and recorded

according to the provisions of law, shall be notice to and take precedence of any subsequent purchaser or purchasers of such land from the time of the delivery of any such instrument at the office of the Register of Deeds of the county in which the lands described in such instrument are situate, for record."

Wyoming Compiled Statutes of 1920, Sec. 4609

"Every conveyance of real estate within this state, hereafter made, which shall not be recorded as required by law, shall be void as against any subsequent purchaser or purchasers in good faith and for a valuable consideration of the same real estate or any portion thereof, whose conveyance shall be first duly recorded."

Wyoming Compiled Statutes 1920, Sec. 4610

The rule is thus stated in Pomeroy's Equity Jurisprudence:

"What classes of persons are thus charged with constructive notice by a regular and lawful registration? The answer to this question must depend upon the language of the recording acts. While the terms of the various state statutes may differ, in respect to this matter, in some of their subordinate and qualifying phrases, they all agree in the main and substantial provision; they all declare that an unrecorded conveyance is invalid only as against subsequent purchasers or encumbrancers, and, as a necessary inference, that the record only operates as a notice to the same persons. In several of the statutes the qualification is added that the subsequent purchaser who is thus protected must be one 'in good faith and for a valuable consideration'; in many of them this language is absent; but whether expressed or omitted by the legislature, it has uniformly entered into and formed a part of the judicial interpretation. In some instances 'creditors' are expressly added."

“It is a fundamental proposition, therefore, established with complete unanimity, that a registration properly made does not operate as constructive notice to all the world, but only to those persons who, under the policy of the legislation, are compelled to search the records in order to protect their own interests. It is equally well settled that such record is not notice to the holders of antecedent rights,—that is, to those who have acquired their rights before the time when the record is made,—and this is so even when the antecedent right may, in pursuance of the statute, be defeated by the fact of the prior record. In other words, the registration of an instrument does not act as a notice backwards in time.”

Pomeroy's Equity, Vol. 2, Section 657

“It is not, however, every subsequent purchaser who comes within the purview of the statute. The mere fact that, subsequently to the registering of a deed of certain premises, a third person purchases the same premises, from any source of title, from any grantor whatsoever claiming to own them, does not render the purchaser necessarily chargeable with notice of the prior recorded conveyance. The only subsequent purchaser who is charged with notice of the record of a conveyance is one who claims under the same grantor from the same source of title. If two titles to the same land are distinct and conflicting, the superiority between them depends, not upon their being recorded, but upon their intrinsic merits. It is a settled doctrine, therefore, that a record is only a constructive notice to subsequent purchasers deriving title from the same grantor.”

Pomeroy's Equity, Vol. 2, Section 658

“Notice by the recording of conveyances is created by the statutes, and its effect is to be learned from their provisions and the adjudications thereon. The statute enacts that every conveyance not recorded shall be void as against any subsequent purchaser in good faith whose conveyance shall be first recorded. Neither the provision itself nor the

objects of a registry law have any reference to prior encumbrances already recorded. The effect of recording a conveyance is not retrospective, nor was it designed to *change rights already vested* and secured by a recorded deed or mortgage. It simply protects a purchaser who takes the precaution to search the records and record his own conveyance against prior unrecorded conveyances of which he had no notice."

- Stuyvesant v. Hone, 1 Sand. Ch. 419, 425
 Same case on appeal, 2 Barb. Ch. 151, 157
 Singer v. Naron, 99 Ark. 446
 New England Co. v. Fry, 143 Ala. 637
 Association, etc. v. Trader's Co., 77 N. J. Eq. 580
 Stevens v. Summers, 68 Ohio St. 421
 Waughop v. Bartlett, 165 Ill. 124
 Kaiser v. Idleman, 57 Or. 224
 Geo. M. McDonald & Co. v. Johns, 62 Wash. 521
 Ackerson v. Elliott, (Wash.) 165 Pac. 899
 Hall v. Williamson Co., 69 W. Va. 671
 Satterfield v. Malone, 35 Fed. 444, 455
 Lewis v. Barnhardt, 43 Fed. 854
 Boynton v. Haggart, 120 Fed. 819
 Maul v. Rider, 59 Pa. 167
 Andrews v. Smithwick, 34 Tex. 544
 Rose v. Dunklee, 12 Colo. App. 403
 Rozell v. Chicago M. & L. Co., 76 Ark. 525
 Davis v. Davis, 49 S. W. 726
 Modlin v. Roanoke R. Co., 145 N. C. 218
 Holley v. Hawley, 39 Vermont, 350
 New York L. Co. v. Hyland, 8 Tex. Civ. App. 601
 Parker v. Brast, 45 W. Va. 399

In considering a case similar to the case at bar, this Court, in *Townsend v. Vanderwerker*, 160 U. S. 186, said:

"The only circumstances that arose during the period of nine years from the time the contract was made which was calculated to arouse his suspicion that she did not intend to carry out her alleged agreement, was the execution of a trust deed in favor of White, of which, however, there is nothing in the bill to indicate that he had actual notice.

While the record of the trust deed would operate as constructive notice to subsequent purchasers or incumbrancers of the property, it is at least doubtful whether it would have the same effect to one who stood in the plaintiff's relation to the property."

Townsend v. Vanderwerker, 160 U. S. 186
 Howard Ins. Co. v. Halsey, 8 N. Y. 271
 Bates v. Norcross, 14 Pick. 224
 Cooper v. Bigley, 13 Mich. 463
 Iglehart v. Crane, 42 Ill. 261
 Doolittle v. Cook, 75 Ill. 354
 U. S. v. Detroit Lumber Co., 200 U. S. 321, 332

"Courts of equity will not impute to a purchaser for a valuable consideration notice of an outstanding equity unless the circumstances are such as to warrant the court in saying not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. It is not sufficient that he had the means of obtaining, and might with prudent caution have acquired, the knowledge, but whether the fact of not obtaining it *was culpable negligence*."

Reed v. Munn, 148 Fed. 738 (8th C. C. A.)

"Before one can be disturbed of rights based upon the record evidence of title, on the ground of notice of adverse possession, it must appear that such possession was open, notorious and unequivocal. No joint or indefinite possession is sufficient to give notice of the equitable rights of one occupant as against the record title of the other."

National W. W. Co. v. Kansas City, 78 Fed. 428, 435
 Townsend v. Little, 109 U. S. 504
 Kirby v. Tallmadge, 160 U. S. 379

The observations of Lord Chancellor Cranworth in the case of Ware v. Egmont, 31 Eng. L. & Eq. 81, 97, are very pertinent to the instant case. "The question, where it is sought to affect a person with constructive notice, is not whether he had the means of obtaining, and might, by

peculiar caution, have obtained the knowledge in question, but whether the not obtaining it was an act of *gross or culpable negligence*. I must not part with this case without expressing my entire concurrence in what has, on many occasions of late years, fallen from judges of great eminence on the subject of constructive notice, that it is highly inexpedient for courts of equity to extend the doctrine."

Acer v. Westcott, 48 N. Y. 384

An exception to the rule that the public records are constructive notice of fraud, so as to start running the Statute of Limitations against an action by the person defrauded, would seem to be especially applicable where, between the party defrauded and the person guilty of the fraud, there existed a fiduciary relation, such as exists between the parties to this action.

The defendants cite the case of *Teall v. Schroder*, 158 U. S. 172, to the point that the recording of a deed or power of attorney is notice to prior owners of the rights claimed under such instrument by subsequent purchasers, and that the heirs in that case were held chargeable with knowledge of their rights by the record of such subsequent conveyances. The opinion of the Court in that case (at page 178) does make that statement. But, aside from the fact that it is a dictum, as this Court decided the case on the Statute of Limitations, the statement is in direct conflict as an authority on that point with the later case of *Townsend v. Vanderwerker*, 160 U. S. 186, directly holding that the record would not operate as constructive notice as to one who was a prior owner of an interest in the property, and the case of *Townsend v. Vanderwerker*, being a later case than *Teall v. Schroder*, must be taken as silently overruling the earlier case on this point.

Townsend v. Vanderwerker, 160 U. S. 186

THE HEIRS OF GEORGE McMANUS AND THE PLAINTIFF ARE NOT CHARGEABLE WITH LACHES.

The plea of laches is always a plea interposed in bar of equity. It is always interposed by a defendant who dare not face the relevant facts that can be proved under the allegations of the bill in a trial of the case on the merits.

This Court has laid down the following general rules making knowledge of his rights by the plaintiff, or of the facts or transaction on which the plaintiff bases his claim, an essential prerequisite to the plea of laches, and these are the only rules that have universal application to cases in which laches is pleaded as a defense.

(a) "Laches proceed on the assumption that the party to whom they are imputed has knowledge of his rights."

(b) "That there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he has no reason to apprehend;" and,

(c) "If a person be ignorant of his interest in a certain transaction, no negligence is imputed to him for failing to inform himself of his rights; *but if he is aware of his interest, and knows that proceedings are pending, the result of which may be prejudicial to such interests, he is bound to look into such proceedings so far as to see that no action is taken to his detriment.*"

(a) Galliher v. Caldwell, 145 U. S. 368

(b) Halstead v. Grinnan, 152 U. S. 412

(c) Foster v. Mansfield R. Co., 146 U. S. 88

As the word has always been interpreted as meaning an inexcusable delay in asserting a right, the term implies knowledge of one's rights to be asserted and failure to exercise due diligence.

The defendants by their motion to dismiss raise this alleged defense that the heirs of George McManus and the plaintiff have been guilty of laches. We now ask where,

in any part of the record in this case, can there be found any basis for such an assertion? Every fact pleaded negatives the existence of laches. Upon a motion to dismiss, the defendant elects to take the bill of complaint as he finds it, and admits all facts well pleaded. A motion to dismiss cannot be aided, nor can the allegations of the bill of complaint be destroyed, by the assumption of false premises on which to build an argument in an attempt to overthrow direct allegations of fact. No fact, or set of facts, can be pointed out in the bill of complaint that in any way tends to show that the heirs of George McManus had any knowledge of their rights, had any notice of their rights, or that they ever knew of the existence of this property, or of its ownership by George McManus, or that they ever had any "knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry," or "were enough to excite their attention and put them on their guard," until the month of February, 1922. What allegations are there in the bill of complaint, or how can any inference be legitimately drawn therefrom, that the heirs of George McManus were "guilty of culpable negligence," or "inexcusable negligence" in failing sooner to discover their rights, or guilty of any negligence in not sooner asserting them; or that they ever "stood by and acquiesced," in any act or transaction engaged in by the defendants in their attempt to acquire the title to this property; or that they ever "stood by" with "shut eyes and hand on mouth" awaiting developments," or that there is a "want of due diligence," in failing to institute proceedings sooner, or "sleeping on their rights," or that they "have delayed the assertion of their claims for an unreasonable length of time," or that there is any "undue and unexplained delay?" None of these essential elements of laches is present in the case at bar. What allegations are there in the bill of complaint on which a court of equity, without hearing any evidence in the case, can justify its

refusal to try the case on the facts, and decline to put the defendants to their answer, decline to hear any evidence as to the equity of the case, and any proof as to "whether, under all the circumstances of the particular case, plaintiff is charged with the want of due diligence in failing to institute proceedings before he did?" What is there in the bill of complaint upon which to predicate a finding "that it would be inequitable to grant the relief prayed for," or that anything done or omitted to be done by the heirs of George McManus, or this plaintiff, has resulted, in "an unfair advantage over the defendants?" What allegations are there in the bill of complaint showing that the heirs of George McManus or the plaintiff were ever partners of the defendant, or ever had any contract with the defendants, or ever participated in any transaction with the defendants, with reference to this property, or with reference to anything in the wide world? There are none. And there are no allegations from which any such inference can be drawn.

At this point we wish to distinctly state that we nowhere claim, either in the bill of complaint, or in this brief, that death tolls the statute of limitations, or that absence from the state tolls the statute of limitations in favor of the absentee, or that such facts standing alone operate to prevent the application of the equitable period of limitations known as laches. But ignorance that is not wilful, and not the result of inexcusable negligence to discover a right that one had no good reason to think or know existed, does operate as a bar to the application of the doctrine of laches. *Knowledge of a right sought to be enforced, or of the transaction or facts out of which such right arises, is a necessary element of laches, and when it is pleaded that the heirs of George McManus were never within the state of Wyoming and had no knowledge of the existence of this placer claim, such an allegation is pertinent to the fact that they never had their feet upon the claim, had never been in its vicinity,*

had never explored its boundaries, and therefore had no actual knowledge of its existence.

Neither are there any allegations in the bill of complaint showing that lapse of time has deprived the defendants of any evidence or testimony necessary to protect their rights in the premises; there are no allegations of any transactions in pais the evidence of which has been lost; neither does the allegation of the death of George McManus in any way detract from the ability of the defendants to support whatever title they may have to the premises in controversy or result to their detriment in any manner whatsoever; but the death of George McManus is a serious detriment to his heirs, as *they, not the defendants*, must necessarily be injured by the lack of his testimony. The defendants knew of the existence of the McManus title, that it had not been divested and had never passed to the defendant the Federal Oil & Development Company. The defendants are not innocent purchasers without notice, but are purchasers with actual knowledge and full notice of the rights of George McManus and his heirs in the premises, (R. 18.) as those facts are specifically pleaded in the bill of complaint, and admitted by the motion to dismiss; and for that reason the defendants are precluded from urging in the face of this record that the inaction and silence of the heirs of George McManus, and their failure to sooner assert a right of which they were wholly ignorant, and excusably so, in property which they did not know to exist, and had no reason to know or even suspect existed, could in any way militate to the defendant's legal injury and damage.

In this case the defendants have been in no way injured by the delay in bringing suit, and the case is utterly barren of equities in their favor, as they have not spent a dollar or done a day's work that they would not have done had George McManus been present in person asserting his right to his undivided interest in the premises. The defendants

were in no way induced by the silence of the heirs of McManus to apply for and procure the oil lease. The real inducement to and motive prompting the action of the defendants in that matter, was the fact that this claim is located in the heart of the Salt Creek Oil Field, then and now well known to everybody to be one of the greatest in the world, and although oil in commercial quantities had not been produced from the claim prior to the granting of the lease, its location made it an absolute certainty that its production would rival that of the adjoining quarter sections and sections in the Field, coupled with their view, as expounded by their counsel in this case, that if they could grab an oil lease while their co-owners were not watching them, such lease would be a final adjudication of the rights of all their co-owners, and leave the defendants in the sole possession of the wealth they were morally certain was contained in this placer claim. And yet we are asked to believe that they were misled by the failure of the heirs of George McManus to appear and assert a right they did not know existed in their favor, and were induced solely by their silence, to apply for the oil lease, and, after its issuance to them exclusively, produce, at a slight expense, the oil placed in the claim in a marketable condition by the God of Nature, and not by the hand of man.

Crary v. Dye, 208 U. S. 521

Pond Creek Co. v. Hatfield, 239 Fed. 622 (C.C.A. 6th)

They knew of the existence of the right and title of George McManus and his heirs, they knew the title was outstanding and that they had not acquired it, but they were not deterred by those known facts from applying for the lease, and cannot now be heard to say that the silence of their co-owners was the determinative factor that ruled their actions. Their success in obtaining the lease doubtless exceeded their expectations, but as to the value of the prize they sought, and secured by the lease, there was never any element of doubt or chance. That value was a fact commonly known of all men from the time of the Executive

Order of Withdrawal in September, 1909, down to the passage of the Minerals Leasing Act in 1920.

The allegations of the bill of complaint are sufficiently explicit to the fact that the heirs were not apprised of the rights of their ancestor nor of their rights in this property, nor of its existence, until the month of February, 1922. (R. 6.) This action was commenced on May 26, 1922, (R. p. 1.) three months after the discovery by the heirs of George McManus of their rights in the premises. The defendant the Federal Oil & Development Company applied for its lease on the premises in controversy on August 28, 1920; on April 1, 1921, an oil lease was issued on that application as of date the 21st day of August, 1920. (R. 9-10.) Thus the defendant the Federal Oil & Development Company applied for a lease eighteen months before, and obtained the lease ten months before, the heirs of George McManus discovered their rights and interest in the premises. Will any court say that three months was an unreasonable length of time in which to investigate the facts, examine the law, and prepare the pleadings in a case of this magnitude, and necessarily requiring a careful investigation of the facts out of which it arose, and of the law properly applicable thereto. What action did the defendants take during that time to their detriment? Absolutely none. The defendant the Federal Oil & Development Company had already taken all the steps necessary to procure the oil lease, and to wrongfully acquire the legal title of the heirs of George McManus, under the Oil Leasing Act, eighteen months before the heirs of George McManus had any knowledge of their rights in the premises. Neither the justifiable silence and excusable inaction of the heirs of George McManus, and the length of time required by the plaintiff to properly investigate and prepare this case, could by any stretch of the imagination have had any influence, nor did it influence, the defendants in their actions concerning this property, or induce them to change their position in regard

months. The defendants took no action and made no expenditures in reliance upon the delay of the heirs of Mr. Mann to secure redress their rights and interest in the premises in controversy.

McIntosh v. Lehigh Valley R. Co., 78 N. J. Eq. 386
Casey v. Day, 206 U. S. 521, 524

"The doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the nonaction of the complainant appeared to damage the defendant, or to induce it to change its position, there is no necessary estoppel arising from mere lapse of time."

Norfolk Pac. R. Co. v. Boyd, 228 U. S. 509
Townsend v. Vandewater, 160 U. S. 186
Kentucky Brick Coal Co. v. Sewell, 249 Fed. 840
Ind. & Ark. Lumber Co. v. Brinkley, 164 Fed. 963
Bussell v. Knapp, 155 Fed. 809
Hall v. Otterson, 52 N. J. Eq. 522
Kelly v. Buchholz, 65 Fed. 55, 29 C. C. A. 14
Monroe v. Hall, 128 U. S. 511, 523
Brundich v. Boyson, 175 Fed. 702
Dean v. Mann, 154 Fed. 154

The "inquiries" in this case are all on the side of the defendants. The allegations of the bill of complaint show that the only title the defendant the Federal Oil & Development Company had to the premises in controversy when it applied for a lease thereon was four undivided one-eighth interests which it acquired on August 26, 1915. (R. p. 16.) On this title the defendant made its application for a lease "claiming" to be the owner of the interest of the heirs of George Williams, a claim made without any shadow of right and known by the defendant to be without any shadow of right. The defendant attempted to relinquish the interest of the heirs of George Williams in this property by quit claim deed to the United States, when it made its

application for lease. This "claim" and "relinquishment" by the defendant of the title of the heirs of George McMannus was doubtless prompted by the construction placed by the Land Department upon Sections 18 and 19 of the Oil Leasing Act that an applicant for a lease under either Section 18 or 19 of the Act should relinquish all the right, title and interest claimed "by the claimant or his predecessor in interest under the pre-existing placer mining law," whereupon the claimant or his successor "shall be entitled to a lease thereon," and that it clearly appears from Sections 18 and 19 of the Act that the "claimant" is a person who located the land under the mining laws or who claims under the locator or locators through a deed or equivalent instrument.

Durke v. Taylor, 47 L. D. 565

While we have no fault to find with this construction of the Oil Leasing Act by the Interior Department, yet it was to meet these requirements of the law that the defendant the Federal Oil & Development Company first "claimed" in its application for a lease, and then "relinquished," to the United States, the title of the heirs of George McMannus to the premises in controversy. After this equitable transaction, the defendants blandly assert that they are entitled to the protection of the equitable maxim that "Equity protects the vigilant." The maxim is a salutary one, but it hardly protects the "equitable vigilance" displayed by the defendant the Federal Oil & Development Company in its claiming and relinquishing an estate and title that it did not own, and knew it did not own. (R. 18.)

The defendants also make a *rele facit* argument in this case that should be noticed. They seek to invoke the doctrine of laches as applied by the courts in mining cases, and in order to make the decisions applying laches in those cases applicable to this case the defendants say, on this point, that the case at bar is a *mining case*. Truth will out, even though it falls from the lips of unwilling defendants.

The case at bar is a *mining case*. Again, we say, that this case is a mining case, and all the principles of law and doctrines of *equity that are applicable to mining cases, are applicable to the case at bar, including the doctrines of "cotenancy."* The law of cotenancy is just as much involved in this case, as is the rule of laches. But the defendants urge that the law of cotenancy as heretofore applied in mining cases does not apply and should not be applied to the case at bar, because, forsooth, say its counsel on this point, the instant case *is not a mining case*. Thus when the defendants seek to evade the doctrine of cotenancy they assert that this case *is not* a mining case; when they seek to apply the doctrine of laches they say *it is* a mining case. Defendants in the court below cited the mining cases of *Patterson v. Hewitt*, 195 U. S. 309, and *Johnston v. Standard Min. Co.*, 148 U. S. 360, to sustain their position, and as showing the strictness of the rule as to laches applied in mining cases. We will therefore take up these cases in their order, and a statement of the facts, taken from the opinions of this Court in those cases, will show that they are totally inapplicable as authorities against the plaintiff in this case.

Patterson v. Hewitt, 195 U. S. 309. The following statement of the essential facts in this case by Mr. Justice Brown of the Supreme Court, sufficiently distinguishes it on its facts from the case at bar: "The facts in this case, so far as they concern the applicability of the defense of laches, are that all prior locations made by the claimants to this land were abandoned in August, 1883, when an oral agreement was entered into that Hewitt should be appointed trustee for all concerned; that upon the performance of certain conditions by the parties interested he should make a deed to each of such parties as should contribute his part for the work and expense necessary to obtain a patent; that each of appellants contributed his share of the work in the years 1883 and 1884—enough to entitle each of them to a deed of his interest under the agreement; that in April,

1885, Henry J. Patterson, demanded a deed of Hewitt, which was refused, but that C. Ewing Patterson did not demand his deed until just before the institution of this suit; that the defendants and their associates, from the year 1885 to 1890, performed a large amount of work in developing the mine, to which neither of the appellants contributed any part; that in November, 1890, a large body of rich ore was discovered, and since that time gold to the amount of several hundred thousand dollars has been taken out. Both of the appellants left the territory of New Mexico during the year 1885, and resided abroad up to the time of the beginning of the suit. *Both were aware that Hewitt had refused to deed them their interest in the mine and in the patent which he, in the meantime, had obtained to the property. In this connection it is sought to apply the familiar rule that neither laches nor the statute of limitations is applicable against an express trust, so long as that trust continues. Conceding all that can be claimed as to the existence of an express parol trust in this case, the refusal of Hewitt to execute the deed to H. J. Patterson of his interest in the property of which both appellants had notice, was a distinct repudiation of such trust, which entitled the complainants to immediate relief, and opened the door to the defense of laches.*"

Johnston v. Standard Mining Co., 148 U. S. 360. The plaintiff in this case knew of his ownership of the property, as he had located it in person; he personally executed the deed divesting himself of his title to the mining claim, and personally executed the contract with Chatfield to reconvey his interest in the lode to him after patent should be obtained; the direct refusal was made by Chatfield two years afterward to comply with this contract and plaintiff knew of Chatfield's repudiation of it before the issuance of the patent. With actual knowledge of all these facts, and personally knowing that the property was claimed and being worked by the Fulton Mining Company, *in which company the plaintiff had been offered and agreed to take stock for his*

interest in the mining claim, he yet deferred taking action for a period of five years after he knew that his trustee had repudiated the trust reposed in him and that the Fulton Mining Company was claiming the title to his interest in the Johnston lode mining claim under his deed to Chatfield. The plaintiff was the principal actor in the transaction by which his rights were ultimately lost, and was chargeable with knowledge of the law applicable to the rights he had helped to create. All these facts are hardly consonant with the facts alleged in the case at bar, and show that the equitable principles governing the Johnson case are not applicable to the state of facts disclosed and admitted in the bill of complaint in this action.

In discussing this question of laches, Circuit Judge Stone, in his dissenting opinion in this case, 5 F. (2d) 450, said:

“It is strongly contended that this bill is barred by laches. The material allegations of the bill bearing on this contention seem to be as follows: Appellant alleges that he and his colocators were in possession and did the usual work required by the placer mining claim laws from the location of the claim in 1887 down to the present time and that they were in open, notorious and adverse possession down to and including the time when the land was withdrawn by executive order, and that order was not recalled until February 25, 1920, when the Oil Leasing Act was enacted. The conveyances made by Cy Iba of an undivided one-half interest in the claim in 1890 can hardly be urged as constituting any color of title to the one-eighth undivided interest of McManus; particularly as five of the other locators had given Iba a power of attorney in 1886 while McManus had never given such authority except to Iba and Fales jointly. Had this been the only conveyance made by Iba, it must be presumed that it would have been of those undivided parts which he had authority to convey rather than of that part which he, acting alone, could not legally convey. Therefore the bill does not allege any fact which even in its most unfavorable interpretation, could be construed as adversely affecting the title or interest of McManus

until Iba undertook to convey a second one-half undivided interest to Joseph H. Lobell on April 12, 1905. But these conveyances alone, if Iba had no legal authority to transfer the McManus interest, could not affect that interest unless there had been such an assertion of title by the grantees as to amount to adverse possession or to require opposing action by McManus to prevent laches in the assertion of his rights. The bill alleges that McManus and his colocators had possession at all times and particularly to the time when the withdrawal proclamation became effective. While I have not been able to procure the withdrawal proclamation to ascertain just what effect it would have upon the exercise of the rights of placer claimants to land covered by the proclamation, yet I apprehend it must have prevented, from the time it became effective until the passage of the Oil Leasing Act (from 1909 to February 25, 1920), any exercise of rights in respect to mineral claims on such land. If that be true, there could, during that period, be no possession or adverse possession by any one in so far as placer minerals were concerned and that period should be regarded as a suspension of rights and duties of rival claimants in respect to such property. The only indication in the bill of any action by either party during that period are the broad statements that McManus and his colocators kept up their work and kept possession continuously; the statements quoted from the letter and decision of the Land Commission in connection with the granting of the lease to the effect that, 'on May 15, 1918, the aforesaid applicant company filed mineral application No. 016998, Douglas Series, for said land, and by letter "FS" of December 8, 1919, it was ordered that adverse proceedings be had in said case, but the application was withdrawn, and by letter "FS" of March 25, 1920, the case was closed'; the further statements in the same document, that 'the status of the fee title to the claim was considered by this office in the letter "FS" of December 8, 1919, in regard to the mineral application aforesaid, and it was held that the title in the land was as follows: Federal Oil & Development Company, ten-sixteenths interest; M. Iba, one-sixteenth interest; H. T. Snively, one-sixteenth interest;

George McManus, one-sixteenth interest; William F. Ford, one-sixteenth interest; George B. Hall, one-sixteenth interest.' I think we have no right to conclude from the bill that there was any adverse possession on the part of the appellees or their predecessors (Victoria A. D. Johnson and the Lobells) during this period or that there was any assertion of rights which would call into play a necessity for McManus or his heirs asserting themselves until application of the Company May 15, 1918, as quoted above; and the adverse proceedings declared in that case seem to have continued until March 25, 1920, when the case was closed. No further movement on the part of appellees is evidenced in the bill until the application made on August 21, 1920, for this lease. The granting of the lease was not approved by the Secretary until April 1, 1921, and this bill was filed May 26, 1922.

"A very essential element in laches is knowledge. The allegation of the bill is that there was no knowledge on the part of the heirs of McManus of any of their rights until February 11, 1922, about three months before the bill was filed. When it is considered that this claim was located in 1887, that McManus died in 1901, that the land was withdrawn by the government from 1909 to 1920, and that development therein was suspended from 1909 until after April 1, 1921 (the date of the lease), and when it is borne in mind that none of the heirs lived near the property or in the state, I am doubtful if such laches appears on the face of the bill as would justify its dismissal. It may be that when issues are joined and evidence introduced this will be shown, but that is not now before us.

"I think the decree of dismissal should be reversed, with instructions to set aside the order of dismissal and reinstate the case for such action as counsel may be advised."

Hodgson v. Fed. Oil & Dev. Co., 5 F. (2d) 450, 451

In this case it is admitted by the motions to dismiss that the heirs were wholly ignorant of their rights; consequently there was not present the elements of information, knowledge, acquiescence, election, standing by, exercising an op-

tion, unchallenged assertion of rights, undue and unexplained delay, lack of diligence in inquiry, or prior connection with the right claimed, which are found separately or collectively where laches was interposed and sustained as a bar to relief in equity.

Plaintiff acted with diligence at the first opportunity, and the Court should consider only such time as has elapsed since discovery of the right.

Godkin v. Cohn, 80 Fed. 458, 25 C. C. A. 557
 Fletcher v. McArthur, 117 Fed. 397
 Galliher v. Cadwell, 145 U. S. 368
 Pickens v. Merrain, 242 Fed. 363
 Townsend v. Vanderwerker, 160 U. S. 186
 Hanchett v. Blair, 100 Fed. 817

The following statements of the doctrine of laches made by the eminent presiding Judge of the Eighth Circuit Court of Appeals are applicable to the facts in this case, and show that the bill is not obnoxious to that plea:

"Laches is of the nature of estoppel. It rests on the principle that a court of equity will not move to enforce one's rights who has *knowingly delayed to enforce them so long that the defendant in reliance upon the owner's acquiescence in his violation of them has made such investments and so changed his position that it would be more inequitable to enforce the owner's rights than to leave them in the state in which he has been content to permit them to be for an unreasonable length of time.*

"Its application is conditioned, not by the lapse of time alone, but largely by such a change of the defendant's position *induced by plaintiff's delay and acquiescence in disregard of his rights as makes it inequitable to enforce them.*"

Layton Co. v. Church & Dwight Co., 182 Fed. 33, 39

"The basis of laches, is estoppel, and where there is no estoppel there is no laches. Mere delay and increase in the value of the property are not such circumstances as entitle a wrong-doer to the application of the doctrine of laches

within the time fixed by the analogous statute of limitations of the action at law, and there are no unusual circumstances or conditions such as the interposition of the rights of innocent third parties, the death of important witnesses, or the loss of documentary evidence, combining with changes in the value of the property, to invoke the application of the doctrine of laches."

Wilson v. Colo. M. Co., 227 Fed. 721, 726 (CCA 8th)
 Ind. & Ark. L. & N. Co. v. Brinkley, 164 Fed. 963
 Ind. & Ark. L. & N. Co. v. Milburn, 161 Fed. 531
 Harrison v. Rice, 78 Neb. 654

"The rules controlling the application of the doctrine of laches are among the most characteristic in equity jurisprudence. If unreasonable delay in seeking relief is the only element to be considered, courts of equity will usually follow the statute of limitations, if there be one which is applicable. The statute of limitations is an arbitrary rule. The doctrine of laches is flexible. Its application depends upon the circumstances of each case. It will not, save in exceptional cases, be applied unless there are conditions other than mere lapse of time which render the maintenance of the suit inequitable and unjust. Laches is not merely a matter of time. It is a question of equity or inequity, of justice or injustice."

"The questions which must be asked and answered in deciding each case are: Has the delay been reasonable? If so, have the conditions or the relations of the property, or of the parties, so changed that it would be inequitable and unjust to permit the plaintiff to enforce his claim? If, during the long delay, important testimony has been lost or destroyed, and the memory of the original transaction become hazy and indistinct, a court of equity may refuse to grant relief because of its inability to do certain and complete justice. If, during the delay, the property in dispute has passed into the hands of innocent purchasers, or the defendant has been lulled into doing something which he

would not have done, except he had been led to believe that the claim was abandoned, the rule of laches may be applied. If the defendant has risked large sums of money developing the property, as a result of which it has greatly increased in value, and the plaintiff has suffered this to be done, intending if the venture proved profitable to assert his claim, but, if unprofitable, to allow the defendant to pay all the losses, then in such a case the court will be justified in saying to the plaintiff: You have been guilty of laches, your delay was not without a motive, and that motive was not good. You were silent while the defendant was risking his money and his labor, but now, when there are no chances to take, you are willing to come in and share the profits. The dominant idea in cases where the doctrine of laches has been applied is that the delay has been productive of changes which render it unjust and unfair to prosecute the suit. If the delay has not prejudiced the defendant, there is no laches."

"The doctrine of laches has been applied more rigorously in mining cases than in any other, because such property is liable to great and sudden fluctuations in value; but, even in such cases, courts of equity never lose sight of the rule which requires them to follow the statute of limitations, unless some extraordinary circumstances or conditions are presented which render it inequitable to permit the suit to be prosecuted. There is nothing in the nature of mining property which changes the essential character of the equitable doctrine of laches. In mining suits where laches has been held a sufficient bar, with very few exceptions, it will be found that the controlling fact was not lapse of time, or increase in the value of the property, or its liability to great and sudden fluctuations in value, but the fact that it would be unfair and unjust to permit the complainant to push his claim."

"Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Johnson vs. Standard Mg. Co., 148 U. S. 360, 13 Sup.

Ct. 585, 37 L. Ed. 480; and *Curtis vs. Lakin*, 94 Fed. 251, 36 C. C. A. 222, are leading cases on this subject, and in each of them the delay was prompted by speculative reasons; in other words, the plaintiff was waiting to see whether the developments undertaken by the defendant would be successful before he decided whether to assert his claim."

Brissell v. Knapp, 155 Fed. 809

Hall v. Otterson, 52 N. J. Eq. 522, 525

Chase v. Chase, 20 R. I. 202

Hodge v. Palms, 68 Fed. 61, 15 C. C. A. 220

Hodge v. Palms, 117 Fed. 396, (CCA 6th)

Lasher v. McCreery, 66 Fed. 840, 841

"In the adjustment of these scales of justice, it is a controlling consideration whether the delay has been without valid excuse—not an excuse in law, but one which would have led a person reasonably to act as the party charged with laches has. A person cannot be deprived of his remedy in equity on the ground of laches unless it appears that he had knowledge of his rights. As one cannot acquiesce in the performance of an act of which he is ignorant, so one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded; excepting always that his want of knowledge is not the result of his own culpable negligence."

Hall v. Otterson, 52 N. J. Eq. 525

"But," says Lord-Justice Thesiger, in *De Buesche v. Alt*, 8 Ch. D. 286, 314, "when once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed the matter is to be determined on very different legal considerations. A right of action is then vested in him, which, at all events, as a general rule, cannot be divested without accord and satisfaction or release under seal. Mere submission to the injuries for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, al-

though, under the name of laches it may afford a ground for refusing release under *peculiar circumstances*."

Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 293

"Laches is a question that should more particularly arise upon a careful examination of the facts in the case, to be disclosed by the testimony taken in it. The bill specifically alleges that the plaintiffs did not learn of the conspiracy and combination to deprive them of their lands until the summer of 1896. This allegation taken in connection with the other allegations of the bill, are questions of fact to be considered upon the final hearing of the case on the merits. It is apparent on the face of the bill that the statute of limitations does not run, and by analogy, a court of equity would hardly determine that a party was guilty of laches within the period that the statute of limitations would not defeat a recovery for land upon the legal title."

"The allegations of this bill are sufficient, upon a demurrer, to entitle the plaintiff to a hearing upon the questions presented, and, in every case in which laches are imputed to a party who seeks to recover land, it must be decided and controlled by the facts and circumstances which surround the particular transaction. There can be no fixed and definite rule to govern and control this question of law."

Ritchie vs. Sayers, 100 Fed. 536-37

"We come now to consider the defense of laches set up by the defendants to defeat the plaintiffs in this action. This is an equitable defense, and is often resorted to when the party who sets it up has no defense in law, and for this reason courts should be very cautious in applying this doctrine to defeat a rightful owner of the land who from neglect which may be the result of the want of proper information refrains from an assertion of his rights until the presumption of abandonment arises from his course of conduct. I am aware of the tendency in courts of this day to recognize the defense with growing favor as both meritor-

ious and valid. 'Laches,' says Mr. Justice Brown in *Gallagher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 'proceeds on the assumption that the party to whom they are imputed has knowledge of his rights, and ample opportunity to establish them in the proper form; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition or relation during this period of delay, it would be an injustice to the latter to permit him to assert them.' In a well considered oral opinion in the case of *Halstead v. Gristman* this court held that laches could not be imputed to one who was ignorant of his rights, and for that reason failed to assert them. This case was affirmed by the supreme court (152 U. S. 412, 14 Sup. Ct. 641), in which case the court says: "There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend. Applying the principles as laid down in the cases just cited to the facts in this case, can we hold that the plaintiffs have slept so long upon their rights as to render their claim to this land inequitable and unjust as against the defendants' claim of title? We think not. There is no fixed and unalterable rule applicable to all cases where laches is relied on to defeat a recovery. Each case must stand or fall upon the facts that surround it. In this case it is claimed that the plaintiffs have been guilty of laches, because the land in controversy was sold in 1892 by the commissioner of school lands, and that the plaintiffs took no steps to relieve themselves from the embarrassment arising from that sale until they brought this action, in 1890, a period of eight years. But there is no evidence that the plaintiffs had abandoned their claim of title or their rightful title to those lands during that period."

Lasher v. McCreevy, 66 Fed. 849, 841

Affirmed in *Cook v. Lasher*, 73 Fed. 709

"By Act June 2, 1858, Congress authorized the issuance

of entitlement to holders of deferred land claims conferred under the treaty of cession of Louisiana, which should be receivable at any land office of the United States in payment for lands. A holder of such a claim, who had never applied for or obtained a certificate thereon, died in 1862, domiciled in Mississippi, and his will was then probated, by which he devised all his property to his children, one of the complainants and the father of the other complainants. Subsequently, without the knowledge of the devisees, proceedings were instituted in Louisiana for the settlement of the testator's succession, in which his land claim was with, and the purchaser, through whom defendants claim, obtained a certificate thereon, which was located on the lands in controversy. Held, that complainants were not chargeable with notice of the proceedings in Louisiana, nor barred by laches from asserting their rights against defendants, whose suit for that purpose was instituted within two years after they first learned of the existence of any adverse claim.¹²

Plattner vs. McArthur, 117 Fed. 398 (Ct. Cl. 1904).

Ky. Coal Co. vs. Sewall, 249 Fed. 240 (Ct. Cl. 1916).

"We agree * * * that the defense of laches has not been established. The delay has been great, but in view of the well-known fact that there was until within comparatively few years no general or substantial development of mineral lands situated as were those in question, that commercial mining of coal was not begun there before 1901, nor hunting for oil and gas before 1912, that plaintiffs did not live in the neighborhood, and that their testimony (generally believed by the District Judge, who heard it) was that they had no knowledge of such development until about a year before the suit was begun, we cannot say that they are chargeable with such want of diligence in failing to earlier institute proceedings as to equitably deprive them of relief. The fact that they paid no taxes on their mineral rights, in the absence of a policy of separate assessment and taxation, is not alone enough to bar them."¹³

Ky. Coal Co. v. Sewall, 249 Fed. 240, 246 (Ct. Cl. 1916).

“It is alleged that this bill should not be sustained, because of laches. The location by Davidson was made June 10, 1869. The suit was brought in the year 1893. The lands are known as ‘pine lands,’ and were for many years after the entry remote from railway communication. They doubtless were obtained, as most lands of similar character in the northern section of the state were purchased, with a view to the prospective increase in value of pine timber. It is true that nearly 24 years had elapsed prior to the filing of the bill to correct the error. But that is not controlling. There must be neglect in the enforcement of a right, and such negligence presupposes knowledge of one’s right. So laches may be excused from ignorance of one’s right or from the obscurity of the transaction. What is required is that one seeking the aid of equity should use reasonable diligence in his application for relief. Thus in *Gallihier v. Cadwell*, 145 U. S. 368, 372, 12 Sup. Ct. 873, it is said that the decisions on the question of laches ‘proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them.’ And on page 373, 145 U. S., and page 874, 12 Sup. Ct., it is said that ‘laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties.’ In *Halstead v. Grinnan*, 152 U. S. 412, 416, 14 Sup. Ct. 641, it is observed:

‘The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an

equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.'

"See also *Alsop v. Riker*, 155 U. S. 448, 15 Sup. Ct. 162; *Gildersleeve v. Mining Co.*, 161 U. S. 573, 16 Sup. Ct. 663.

"Applying these principles to the facts stated in the bill, we are unable to say that the appellant or any of his grantors is properly chargeable with laches. We can discover here no sleeping upon one's rights, or any negligence in ascertaining those rights. There was no assertion of claim to this lot 2 by any one other than Davidson's grantees until the month of August, 1892, when Cohn, with knowledge of the mistakes, designedly imposed upon his grantor, and obtained a legal title to the lot which he had not purchased, and which his grantor did not claim. That was the first assertion of an adverse claim to the property to which the appellant had equitable title. There was no actual invasion of the possession until December, 1892, and thereafter the appellant proceeded with diligence, both by notification to the parties and by suit, in the assertion of his rights. During the period between the location of the lands by Davidson and the assertion of title by Cohn there was nothing to put the parties upon inquiry with respect to the mistake. An investigation of the records of the land office at Stevens Point or Wausau would not have suggested an error; to the contrary, would have confirmed them in the belief that there was no error. It is true that an examination of the plat in the general land office at Washington would have disclosed the mistake, but, without anything to put them upon inquiry, and in the absence of any adverse claim to the property, we are not prepared to say that diligence required a journey to Washington, or communication with the general land office at Washington, to verify the correctness of the government plat in the land office at Stevens Point or Wausau. There was, therefore, no negligence in failing to apply

for a correction of the error under sections 2369, 2372, Rev. St. Neither Davidson nor his grantee knew, or could reasonably be charged with knowledge, of the errors prior to the assertion of title by Cohn. Until then they had no knowledge of their rights, and there was no sleeping upon their rights; nor has Dunfield or any of his grantees been prejudiced by the lapse of time."

Godkin v. Cohn, 80 Fed. 465, 467 (CCA 7th)

McManus died intestate in 1901. At that time he was a co-owner in the O'Glase claim, and by reason of the performance of the annual labor, the possession of his co-locators and co-owners was his possession. In the absence of forfeiture proceedings under the statute his rights were preserved. Nothing appears in this record which required action on the part of McManus or his heirs to assert his or their rights. Where his cotenants manifested no purpose to disturb him or question his or their claim it was not necessary for him or his heirs to establish his claim or title. The silence and inaction of his cotenants was an acknowledgment of his title.

Nowell v. McBride, 162 Fed. 432, 441 (CCA 9th)

U. S. v. New Orleans P. Ry. Co., 248 U. S. 507

Ruckman v. Cory, 129 U. S. 387

Reed v. Bachman, 61 W. Va. 452

Ballard v. Golob, 34 Colorado, 417, et seq.

"If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending the result of which may be prejudicial to such interest, he is bound to look into such proceedings so far as to see that no action is taken to his detriment."

Foster v. Mansfield R. Co., 146 U. S. 88

Wilson v. Colo. Min. Co., 227 Fed. 726

“The question of laches turns not simply upon the number of years which have elapsed between the accruing of rights, whatever they are, and the assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances accruing during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed upon the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in conditions or relations during this period of delay, it would be an injustice to the latter to now permit him to assert them.”

- Galliher v. Cadwell, 145 U. S. 372
- Godkin v. Cohn, 80 Fed. 458, 25 CCA 577
- Ritchie v. Sayers, 100 Fed. 536
- Wilson v. Colo. Min. Co., 227 Fed. 726 (CCA 8th)
- Pond Creek Co. v. Hatfield, 239 Fed. 628
- Townsend v. Vanderwerker, 160 U. S. 171
- McIntire v. Pryor, 173 U. S. 38
- Foster v. Mansfield R. Co., 146 U. S. 88
- Halstead v. Grinnan, 152 U. S. 412
- Lasher v. McCreery, 66 Fed. 834
- Northern Pac. R. Co. v. Boyd, 228 U. S. 482
- Fletcher v. McArthur, 117 Fed. 393 (CCA 6th)
- Hodge v. Palms, 68 Fed. 61, 15 CCA 220
- Hodge v. Palms, 117 Fed. 396 (CCA 6th)

After the death of McManus in a state other than that of the residence of his several heirs, they were in ignorance of his property interests, and remained without knowledge or information suggesting or leading to knowledge of his title in the O'Glase claim. The law cast the descent of his

interest in the mining claim upon them, but they were in total ignorance of the existence of their rights, and of whose existence they had no reason to apprehend, therefore they were not chargeable with laches. The heirs of McManus being ignorant of their interest in the O'Glase claim until February, 1922, no negligence is imputable to them for failing to inform themselves of their rights. As a general rule laches cannot be imputed to one who has been justifiably ignorant of his rights, or of the facts creating his cause of action, and who therefore failed to assert it, or, as the rule is sometimes expressed, it is an essential element of laches that the party charged with it should have had knowledge of the facts creating his right or cause of action.

Pond Creek Co. v. Hatfield, 239 Fed. 628 (CCA 6th)
Moore v. Crawford, 130 U. S. 139
Fletcher v. McArthur, 117 Fed. 393, 395
Hodge v. Palms, 117 Fed. 396 (CCA 6th)
McIntire v. Pryor, 173 U. S. 38
Kentucky Coal Co. v. Sewell, 249 Fed. 840
Pickens v. Merrain, 242 Fed. 363
Townsend v. Vanderwerker, 160 U. S. 186
Baker v. Schofield, 243 U. S. 114
Sayres v. Burkhardt, 85 Fed. 246

"The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice. It has no function when the analogous action or proceeding at law is not barred, and no unusual conditions invoke its application within the time fixed by the statute of limitations in the analogous action at law, in order to secure a just result." Sanborn, Circuit Judge, in:

Bunch v. U. S., 252 Fed. 678

Taylor v. Sawyer Spindle Co., 75 Fed. 301

There is not a fact alleged in the bill showing any of the elements of estoppel against George McManus and his heirs, and the essential elements of an estoppel must appear on the face of the bill in this action to sustain the plea put forward by the defendants. All the facts, alleged in the bill, when

taken with the presumptions legally deducible therefrom, fail to show that the justifiable silence of the heirs of George McManus induced the defendants to take any step in this matter that the defendants would not have taken had the heirs of McManus been on the ground asserting their rights to their interest in the premises. The defendants cannot say they were misled by silence, as silence, without knowledge of one's rights, is not alone sufficient to estop one from asserting his title to real property. The defendants cannot say they were ignorant of the rights of the heirs of McManus, as the bill alleges their knowledge (R. 18.) and those allegations are admitted by the motions to dismiss. If it would be inequitable to enforce this claim against the defendants, it must be shown by allegations and proof on their part, as the allegations of the bill signally fail to show that they have suffered any detriment or loss of which they can rightfully complain, or that they have been prejudiced by the delay of the heirs of McManus in enforcing a right of the existence of which they were wholly ignorant.

The defendants rest their case upon the motions to dismiss, and the case must be determined, in its present shape upon the theory that the facts are as alleged in the bill. The Court must therefore take the case to be that which is presented by the bill. The defendants by their motion to dismiss admit that the heirs of George McManus had no knowledge, or information leading to knowledge, of the right, title and estate of George McManus in the O'Glase placer claim, and were in ignorance of the existence of their rights in the premises and that their interest in the O'Glase claim has never been divested, forfeited, or abandoned. The O'Glase claim was not open to entry or purchase from September 27, 1909, until February 25, 1920, under the construction placed upon the mining laws and the Executive Orders of Withdrawal of September 27, 1909, and July 2, 1910, by the Department of the Interior of the United States, as we have heretofore shown, and is conclusively

evidenced by the fact that on May 15, 1918, the defendant the Federal Oil & Development Company, filed its mineral application for a patent to the O'Glase claim and on December 8, 1919, *the Land Department ordered that adverse proceedings be had on said application for a patent*, but the application was thereafter withdrawn, and on March 25, 1920, one month after the passage of the Minerals Leasing Act the case was closed. (R. 10, 11.) That is the indisputable construction placed upon the Withdrawal Orders and the law by the Executive Department of the Government of the United States from September 27, 1909, down to the passage of the Minerals Leasing Act of February 25, 1920, as applied to this case, and thus under the averments of the bill in this action, considered in the light of the law as construed and applied by the Interior Department, it is indubitable that the heirs of George McManus were not and could not be guilty of laches.

THE ALLEGATIONS OF THE BILL AS TO LACK OF
KNOWLEDGE ARE SUFFICIENT

The defendants urge that the bill of complaint does not sufficiently plead that the heirs of George McManus had no knowledge of their rights, interest and estate in the premises in controversy until February, 1922, or how they came to be so long ignorant of their rights, and does not plead diligence in attempting to discover that they were the owners of an estate of which they had absolutely no knowledge or information, the existence of which they had no reason to even suspect, and are therefore chargeable with laches. The facts pleaded in this regard are the direct and ultimate facts that the heirs of George McManus had no knowledge of the existence of such rights, and that they did not know until on or about the date named in the bill that George McManus had any right, title, or estate in the property in controversy in this action. These are direct allegations of ultimate facts and literally comply with the requirements of the new Federal Equity Rules that:

“Hereafter it shall be sufficient that a bill in equity shall contain . . . a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.”

New Federal Equity Rule 25

Am. Mills Co. v. Am. Surety Co., 260 U. S. 369

These allegations in the plaintiff's bill correspond exactly with the allegations in the bill of complaint, sustained by this Court in the case of U. S. v. Diamond Coal & Coke Co., 255 U. S. 323, reversing the decision of the Circuit Court of Appeals of the Eighth Circuit on this exact point, found in 254 Federal 266, the case chiefly relied upon by the defendants as their authority for the position they take on this question, a case which was read at great length with exceeding unction by their counsel in the court below, with trenchant comments upon the similarity of the allegations

as to lack of knowledge contained in the plaintiff's bill in the instant case and the bill of the United States in that case, only to discover, the next day, alas, that this supposedly binding authority had been reversed by this Court upon this very point.

In the case of *United States v. Diamond Coal & Coke Co.*, supra, the allegations in the bill of complaint sustained by this Court on appeal, as to the time when the plaintiff's right to bring the action was discovered, what the discovery was, how it was made, why it was not made sooner, and the circumstances of discovery, were in the following words:

"Neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the plaintiff as aforesaid, excepting that on or about the month of November, 1916, there was filed in the General Land Office of the United States, at Washington, D. C., a report upon said entries by one John A. Smith, Special Agent of the Department of the Interior."

U. S. v. Diamond Coal & Coke Co., 254 Fed. 270

That allegation is exactly the same allegation that is made by the plaintiff in this case on that subject, and it was upon that very point that this court reversed the Circuit Court of Appeals of the Eighth Circuit, this Court holding that not only must that allegation be considered but all other allegations in the bill of complaint. In the instant case, the consideration of all the allegations of the bill will clearly show the distinction between the facts of the instant case and the facts of those cases in which the strict rule of requiring the pleadings of the evidence under the old equity rules was enforced. In reversing the Circuit Court of Appeals of the Eighth Circuit in the *Diamond Coal & Coke Co.* case, this court said:

"Coming, then, to consider the allegations of the bill for the purpose of testing the conclusions based upon them by the court below, as just stated, we are of opinion that such

conclusions cannot be sustained without drawing unauthorized inferences from the facts alleged, and thus deciding the case by indulging in mere conjecture. Without going into detail, we briefly advert to the inferences from two subjects dealt with by the court below which illustrate the necessity for the conclusion just stated. In the first place, let it be conceded *arguendo* that the conveyances from the entrymen to the corporation, as alleged, following almost immediately the initiation of the right to purchase, and preceding the patents, the uniformity of the method employed, and the surrounding circumstances, would all, if known, have constituted badges of fraud of such a character as to produce the result which the court below based upon them. But the result thus stated depends upon the existence of knowledge of such facts, or of knowledge of other facts from which they were reasonably deducible,—a situation which does not here exist, as the averments of the bill as to concealment exclude that conclusion. True it is that, in dealing with the question of the technical sufficiency of the pleading, the court below directed attention to the fact that it contained no allegation that the conveyances made by the entrymen had not been seasonably recorded; but that in no way justifies the inference that they had been recorded and therefore gave notice of the fraud, even if it be conceded, for the sake or the argument, that such recording was adequate to give such notice,—a question which we do not now decide.

“So, also, let it be conceded, as held by the court below, that the allegations of the bill as to the possession of the land by the corporation at the time of the purchase by the entrymen, and subsequent to their conveyances; of the proximity of the land to the field of operations of the corporation; of its exploitation by the corporation for the purpose of taking coal therefrom,—all, in and of themselves, if open and public, so as to be known, constituted such indications of fraud as to give notice to the United States, or

at least to put it upon inquiry. But again, that concession is here irrelevant since the averments of concealment and other allegations in the bill are susceptible of the construction that the possession of the corporation was clandestine, and that its operations as to the property were of the same character, because not conducted in its own name, but by persons interposed with the very object of concealment.

“Viewing the case in the light of these considerations, as well as of others to the same effect, to which we do not stop to refer, we are of opinion that error was committed in disposing of the bill upon the motion to dismiss, and that the ends of justice require that it should be only finally disposed of after hearing and proof, thus excluding the danger of wrong to result from a final determination of the cause upon mere inferences without proof.”

U. S. v. Diamond Coal & Coke Co., 255 U.S. 334, 335

A direct statement that a person has no knowledge or information leading to knowledge until a certain time, of his rights in the premises, is the statement of an ultimate fact of what was the impediment to an earlier prosecution of the claim, and renders futile any attempt to allege how he came to be so long ignorant of his rights. The cases reiterate that where there is no knowledge of the existence of a right, there can be no laches, and renders unnecessary the pleading of evidence to establish a negative. The allegation in the bill of complaint as to absence from the state was made simply for the purpose of showing that the heirs of George McManus had never had their feet upon the lands in question, and were never in close enough proximity to the O'Glase placer claim to have any knowledge of its existence, knowledge being the essential element which must exist in order to sustain a plea of laches.

Godkin v. Cohn, 80 Fed. 458, 25 C. C. A. 564
 Fletcher v. McArthur, 117 Fed. 393 (CCA 6th)
 Lockhart v. Leeds, 195 U. S. 433

Where laches cannot be imputed there is no reason to plead an excuse, and no laches can be imputed to the heirs of George McManus, as they had no knowledge of his ownership of an undivided interest in the mining claim, and therefore no knowledge that this interest had descended to them by law, and they could not enforce their undivided interest in the premises which was not disputed until the legal title had passed from the United States to them and their cotenants, which was not until April 1, 1921, when the lease was granted to the defendant the Federal Oil & Development Company, and a sixty per cent working interest thereafter assigned by it to the defendant The Mountain & Gulf Oil Company, who was not a purchaser for a valuable consideration without notice; and that the legal title could not have been sooner procured is conclusively shown by the fact that the defendants in 1918 applied for and attempted to obtain a patent to the O'Glase claim from the United States and were promptly adversed by the Government and in those proceedings distinctly notified by the Land Department that they considered George McManus at that time to be the owner of at least an undivided one-sixteenth interest in the claim. (R. 10-11-12.)

Furthermore, it may be well to consider that the cases cited by the defendants on this branch of the case, to the effect that the plaintiff must fully plead all the evidential facts, constituting the hindrance or impediment (in this case lack of knowledge), that prevented the heirs of George McManus from discovering their rights, or sooner bringing the action, are based upon the cases of *Badger v. Badger*, 2 Wall. 87, and *Bailey v. Glover*, 21 Wall. 342, in which the formula of what this Court deemed necessary to be pleaded in those cases in order to avoid the bar of laches is laid down, and these cases are the precedents for the obsolete rule of pleading contended for by the defendants in this case.

Badger v. Badger, 2 Wall. 87, cannot be an authority in

the instant case, as the following excerpts from the opinion of this Court fully show:

"The whole transaction was public and *well known to the widow and the heirs and their guardians*. The purchase of the estate by the guardian could have been avoided at once if the parties disapproved of it. There is not and could not have been any concealment of the facts of the case. For more than twenty-five years the widow and heirs have acquiesced in this sale, and it is more than thirty years since the administration account was settled, which is alleged to have been fraudulent. And now the aid of a court of chancery is demanded to destroy a title obtained by judicial sale, after the parties complaining, *with the full knowledge of their rights*, have slept upon them for over a quarter of a century."

Badger v. Badger, 2 Wall. 93, 94

It is obvious that a rule of pleading laid down to meet the facts in a case of that kind can have no application to the case at bar, and this rule has only been enforced in cases based on similar facts, such cases being those in which the plaintiff had actual and antecedent knowledge of the existence of the rights which he failed to assert within a reasonable time, or in which the plaintiff was a party to or an actor in the transaction out of which his rights and cause of action arose, and had knowledge of those rights which he failed to enforce within a reasonable time, and in such cases it has been held necessary to plead persuasive and compelling circumstances showing a valid excuse for such negligence or lack of diligence in failing to enforce rights actually known to exist by the parties who sought to enforce them after an unreasonable and culpable neglectful delay. Neither of these cases justify the sweeping statements made and the conclusions drawn from them by the defendants as authorities in the case at bar, as we have the benefit of knowing just what was alleged in the pleadings in the case of *Bailey v. Glover*, 21 Wall. 342, and the

similar cases of *Rosenthal v. Walker*, 111 U. S. 187, and *Traer v. Clews*, 115 U. S. 536, on the question of when and how the discovery of the cause of action was made, which were held sufficient by this Court, on this very point.

In the case of *Bailey v. Glover*, 21 Wall. 342, the averment in the bill of complaint as to how and when the facts constituting the cause of action were discovered, as shown by the report of that case, and approved as sufficient by this Court, are as follows:

"That the defendants kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge both of the assignees and of the said *Winston & Co.*, creditors of the bankrupt, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that, even up to the present time, they have not been able to obtain full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property."

Bailey v. Glover, 21 Wall. 342

In the case of *Rosenthal v. Walker*, 111 U. S. 187, the allegation in the bill on this point held sufficient by this Court was as follows:

"Both the said *Carney* and the defendant kept concealed from him, the said plaintiff, the fact of the said payment and transfer of the aggregate sum of \$30,000, and the fact of the sale, transfer and conveyance of the said goods; and that he, the said plaintiff, did not obtain knowledge and information of said matter until the 29th day of November, A. D., 1879, and then, for the first time, such matters were disclosed to him and brought to his knowledge."

Rosenthal v. Walker, 111 U. S. 187

In the case of *Traer v. Clews*, 115 U. S. 536, the allegation in the bill of complaint in that action as to how and when the discovery was made, and approved by this Court as sufficient, was in the following words:

"That as to the matters and things herein set forth as a cause of action against the said Ella D. Traer, the said fraudulent transactions with which she was connected and her part therein were studiously concealed from the plaintiff and his assignor, and he had no means of discovering the same, nor had his assignor any means of discovering the same until the same were disclosed upon the examination of John W. Traer as witness in this action, on the 24th day of September, 1879; that the plaintiff and his assignor did not know of the said fraud and the fraudulent acts of the defendant, Ella D. Traer, until the same were made known on the said examination."

Traer v. Clews, 115 U. S. 536

Wherein are the allegations quoted from the four foregoing cases different in legal effect and in pleading the ultimate facts than the allegation in the plaintiff's bill, "that none of the said heirs at law of the said George McManus, deceased, knew or had any knowledge, or information leading to knowledge, of the right, title, interest and estate of the said George McManus in and to the said Southeast Quarter of Section 13, Township 40 North, Range 79 West, under the mining laws of the United States, or otherwise, until on and after the 11th day of February, 1922. . . ." (R. 6-7.) This allegation, taken in connection with the other allegations of the bill, is certainly sufficient to withstand attack by motion to dismiss, especially when it is remembered that the defendants had the remedy for this alleged defect in their own hands, had they chosen to use it, in Rule 20 of the New Equity Rules by a motion for "further and better particulars of any matter in any pleading." But this instrument of disclosure the defendants carefully refrained from using, knowing full well that the bill is easily capable of amendment with respect to that matter in a manner that will satisfy the most hypercritical.

Tested by the criterion laid down by Chief Justice White in the case of U. S. v. Diamond Coal & Coke Co., 255 U. S.

233, as follows: "Viewing the case in the light of these considerations, as well as of others to the same effect, to which we do not stop to refer, we are of opinion that error was committed in disposing of the bill upon the motion to dismiss, and that the ends of justice required that it should be only finally disposed of after hearing the proof, thus excluding the danger of wrong to result from a *final determination of the cause upon mere inference without proof*;" also tested by the rule laid down by the Circuit Court of Appeals of the Ninth Circuit in the case of *Pickens v. Merriam*, 242 Fed. 370, in an appeal from a decree dismissing a bill on the ground of laches, in which that Court was asked, as the Court is in this case, to presume the existence of certain facts on inferences attempted to be drawn from the bill, that:

"The appellants contend that a change of condition will be presumed, and that prejudice may be presumed from the lapse of time; that a change in position might have occurred; that an important witness has died; that a large part of the estate consisted of real property situated in Los Angeles and San Pedro; and that a marked increase in the value of the property will be presumed. It may appear to be a too strict adherence to the rules of procedure to hesitate to entertain the last named presumption; *but we think such matters are matters of defense, and should be established by proof upon the hearing of the case.* We find nothing in the bill of complaint showing such a change of conditions in the property, or in the relations of the parties thereto, or such a lack of equity as would prevent a court of equity from granting appropriate relief."

Pickens v. Merriam, 242 Fed. 371

and the statement of Judge Jackson in the case of *Ritchie v. Sayers*, 100 Fed. 536, 537, that: "Laches is a question that should more particularly arise upon a careful examination of the facts in the case, to be disclosed by the testimony taken in it," the allegations of the bill of complaint

in the instant case are sufficient to entitle the plaintiff to a hearing upon the merits on the questions presented.

We are not alone in our contention that the New Equity Rules only require the pleading of ultimate facts upon which the plaintiff seeks relief, omitting the evidence, and that it is the duty of the courts to give effect to this purpose by requiring counsel to omit unnecessary allegations and to cut out all useless verbiage, no matter how greatly it may have the sanction of centuries behind it. We are supported in this position by very respectable authority, Hon. John C. Rose, Judge of the Third Circuit Court of Appeals, as the following quotations will show:

"Under the provisions of Sections 913 and 917 of the Revised Statutes the procedure in equity in the federal courts is, in larger part, regulated by the Equity Rules prescribed from time to time by the Supreme Court. . . . On February 1, 1913, an entirely new set went into force. They made radical changes in equity pleading and practice."

"They are intended to promote the prompt decision of causes and to insure, as far as possible, that they shall be decided in accordance with the substantial rights of the parties and not upon mere technicalities."

"To this end the 18th rule declares 'unless otherwise prescribed by statute or these Rules, the technical forms of pleading in equity are abolished'."

Rose, Fed. Juris. & Proc., Secs. 489, 490, 491

"A bill in equity should set forth the full name of every party when known, his citizenship and residence. If any party be under disability that fact should be stated. The bill should contain a short and plain statement of the grounds upon which the jurisdiction of the Court depends and of the ultimate facts upon which the plaintiff seeks relief. It is expressly directed that any mere statement of evidence shall be omitted. . . . One of the objects of the Supreme Court was to get rid of unnecessary prolixity in

equity pleading. It is the duty of the courts to give effect to its purpose by requiring counsel to omit unnecessary allegations and to cut out all useless verbiage, no matter how greatly it may have the sanction of centuries behind it."

Rose, Fed. Juris. & Proc., Sec. 492

And also the opinion of Chief Justice Taft in *American Mills Co. v. American Surety Co.*, 260 U. S. 364, as follows:

"The New Equity Rules were intended to simplify equity pleading and practice *by limiting the pleadings to a statement of ultimate facts without evidence*, and of uniting in one action as many issues as could be conveniently disposed of."

We submit that the bill of complaint in this action significantly conforms to the New Equity Rules and the statement of the eminent legal author above quoted as to their object and effect, the above quoted decisions of *Bailey v. Glover*, supra, *Rosenthal v. Walker*, supra, *Traer v. Clews*, supra, and the latest decisions of this Court in *U. S. v. Diamond Coal & Coke Co.*, 255 U. S. 323, and *American Mills Co. v. American Surety Co.*, supra, on this question, and if the allegations of the bill do not conform to those authorities above cited, on this point, it is capable of amendment in that respect, and such an amendment should be allowed as a matter of right and cause in this case, and this plaintiff should not be prejudiced in this respect in this matter by having been summarily dismissed out of court by the District Court without any opportunity being given him to amend. In considering a similar case this Court has said:

"But as this court might, even now, if justice appeared to require it, allow an amendment of the pleadings, this part of the case may be more satisfactorily disposed of by considering what the effect of those facts would have been, had they been duly pleaded."

Jones v. Meehan, 175 U. S. 1, 29

In order that substantial justice may be done in this case, and without in any manner admitting that the allegations of the bill of complaint are insufficient, we submit that the

rule laid down in *Jones v. Meehan*, supra, should be applied in the instant case, and especially in view of the fact that the ironclad rule in vogue fifty years ago, that no amendment should be allowed, has long since vanished into thin air, has been abolished in actual practice, and can have no application to a case where no evidence has been offered by either side, and no trial had upon the merits.

The defendants place great reliance on this point on the case of *Wood v. Carpenter*, 101 U. S. 135. That case was an action at law in which this Court was called on to construe a statute of limitations of the state of Indiana, and it followed the adjudications of the Supreme Court of that state upon the same statute. The facts as recited in the opinion of this Court in that case showed that the statute had run in favor of the defendant. It was a case involving certain judgments recovered by the plaintiff against the defendant. The defendant had disposed of his property with intent to defraud his creditors, by making a fraudulent assignment of all his property to certain individuals other than the plaintiff, and confessing sundry fraudulent judgments for large sums in their favor, and thereafter procured the title to all his real and personal estate to be vested in his brother and others, who held the property in secret trust for the defendant. This occurred in the year 1858. The judgments that the plaintiff in that case sought to enforce against his scoundrelly debtor were entered in 1860. Thereafter and in January, 1864, the defendant persuaded the plaintiff to assign the judgments recovered by the plaintiff to the defendant's son-in-law, Keller, for fifty per cent of their principal and interest. This was the specific wrong complained of, and the gravamen of the action was the transfer of the judgments against the defendant for the consideration of fifty cents on the dollar when they were good for the entire amount, which transfer, it was alleged, was brought about by the fraud and misrepresentations of the defendant and his son-in-law Keller. After

the assignment of the judgments to Keller he caused satisfaction of them to be entered at the instance of the defendant. In that case the statute of limitations commenced to run on January 1, 1864, the date of the assignment of the judgments, and became complete on January 1, 1870. The fraudulent judgments which the defendant confessed for the purpose of defrauding the plaintiff in that action were a matter of record, and the plaintiff in that action knew it, but made no inquiries or investigations concerning them or concerning the fraudulent assignment of his property to the defendant's brother and son-in-law during the period between 1858 and 1872. On these facts the court held that the concealment, or attempted concealment, by the defendant by mere silence was not sufficient to prevent the plaintiff from discovering the fraud, when that plaintiff was fully acquainted with his rights in the premises, could have ascertained the facts had he followed the knowledge he possessed, and with the strongest motives to action the plaintiff was supine, and that he did nothing to unearth the underlying frauds which he alleged existed, and this Court laid great stress upon the point that when the judgments the plaintiff recovered against the defendant were assigned to his son-in-law, Keller for fifty per cent of their value, the country was in the throes of the Civil War, Lee had not surrendered, gold and silver, in the currency of the time, were at a large premium, all real property was largely depreciated, and the future was uncertain; that a transaction which then seemed wise and fortunate, a year later might be deemed greatly otherwise, and it was hard to avoid the conviction that the plaintiff's conduct marked the difference between forethought in one condition of things and afterthought in another. We hardly see how the facts in that case bear any similarity to the facts in the case at bar, nor how a rule of pleading that might be justified in that case, can in any way be applicable to the instant case.

NONE OF THE CASES CITED BY THE DEFENDANTS
ON THE QUESTION OF LACHES IS IN POINT
ON THE FACTS PLEADED IN THE
INSTANT CASE

On the hearing in the court below the defendants in their argument and brief cited the following cases as sustaining their plea of laches, which cases we shall now distinguish on their facts from the facts pleaded in the bill of complaint in the instant case. In all those cases the plaintiffs *had actual and antecedent knowledge of their rights* which they failed to assert or enforce within a reasonable time, or *were parties to or actors in the transactions out of which their rights arose*, and necessarily had knowledge of those rights, but refrained from claiming or enforcing them either through culpable negligence, inexcusable indifference to their known rights, or from a motive of cupidity. The following excerpts from the facts of some of the cases cited by the defendants, are typical of them all, and show a state of facts the very antithesis of the facts pleaded in the instant case. We take them up in the following order:

Twin-Lick Oil Company v. Marbury, 91 U. S. 587. The following facts from this case show that it cannot be considered as an authority in the case at bar.

“Appellant here, the plaintiff below, was a corporation organized under the laws of West Virginia engaged in the business of raising and selling petroleum. It became very much embarrassed in the early part of 1867, and borrowed from the defendant the sum of \$2,000 for which a note ~~was~~ given secured by a deed of trust, and conveying all the property rights, and franchises, of the corporation to William Thomas, to secure the payment of said note, with the usual power of sale in default of payment. The property was sold under the deed of trust; was bought in by defendant's agent for his benefit, and conveyed to him in the summer of the same year. The defendant was at the time

of these transactions, a stockholder and director of the company; and the bill in this case was filed in April, 1871, four years after, to have a decree that defendant holds as trustee for complainant, and for an accounting as to the time he had control of the property." . . . "While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations, in the value of anything known as property, requires prompt action in all who hold an option whether they will stand its risks or stand clear of them. The case before us illustrates these principles very forcibly. The officers, and probably all the stockholders, who were not numerous, *knew of the sale as soon as made*. As there was no actual fraud, *they knew of the acts on which their right to avoid the contract depended*. They not only refused to join the defendant in the purchase when that privilege was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt. The defendant then had a survey made of the ground leased to the corporation, the lease being the main thing he had acquired by the sale. When the lines were extended the lease was found to embrace a well, then profitably worked by another company, of this piece of good luck he availed himself, and by suit and compromise he obtained possession of that well. He put more of his money into it, and changed what had been a disastrous speculation by the Company into a profitable business. *With full knowledge of all these facts*, the appellant took no action until this suit was brought, nearly four years after the sale; and not until all the hazard was over, and the defendant's skill, energy and money had made his purchase profitable, was any claim or assertion of right in the property made by the Corporation or by the stockholders."

It is very easy to see that the foregoing facts found in

the Twin-Lick-Marbury case justifies the statement of law laid down by Mr. Justice Miller in that case, but that statement of the law can hardly be stretched to cover the facts alleged in the bill in this action, without the aid of unfounded inferences and unwarranted deductions.

Godden v. Kimmell, 99 U. S. 201. The abstract propositions of law laid down by this Court in that case have been much cited, quoted, and applauded, by the counsel for defendants in the instant case in their briefs in the courts below, but the facts are so utterly dissimilar to the facts alleged in the bill of complaint in the instant case, that it can have no application as a binding authority on laches herein. We quote from the opinion of this Court:

"It appears that the complainants are, or claim to be, creditors of Edwin Walker deceased, and that they instituted the present suit in behalf of themselves and other creditors of the deceased to recover a moiety of certain real and personal property, together with the rents and profits of the same, which, as they allege, belonged to their debtor in his lifetime and at the time of his decease. They allege that their debtor owned and held the property described in the bill of complaint in common with one Abram F. Kimmell, of the City of Washington, since deceased, with whom he was carrying on a livery stable business, under the firm name of Walker & Kimmell, the said property being used for the purposes of said business; that the said Walker being largely indebted to the complainants, their testators and intestates, as well as other parties, dissolved partnership with said Kimmell and conveyed all his real and personal estate, after payment of all partnership debts, to one Voltaire Willett by deed dated October 8, 1857, in trust to pay off the complainants, their testators and intestates, with the proceeds thereof, the remainder to be paid over to the grantor, his heirs and assigns. Possession of the property at the time was in the junior partner; and the complainants allege that he continued in the possession

thereof up to the day of his death, holding the same and applying the proceeds thereof to his own use, without accounting for the rents, or profits, either to the grantor, the trustee or to the creditors; and that since his death the property has been in the possession of his widow and children, who have appropriated the same to their own use; and that they utterly deny all right of the complainants to any part or interest in the same. Sufficient appears from the preceding statement to show what the circumstances were on February 1, 1871, when the present bill of complaint was filed against the respondents in the Subordinate Court. . . . Fourteen years elapsed from the date of the deed to the filing of the bill, and throughout that period none of the complainants, during the lifetime of the partners and trustee or any of them, took any steps whatever to ascertain or enforce their rights, if any they had, under that trust deed." *The above facts show actual knowledge on the part of the complainants in that case of their claims and the means taken to secure them, and a resolute refusal to enforce their rights under the trust deed for a period of fourteen years.*

Broderick's Will, 21 Wall. 503, was a suit in equity brought to set aside the probate of the will of David C. Broderick, to have the same declared a forgery and to recover the said Broderick's estate, much of which consisted of land now, and then, comprised in the thickly settled portions of the city of San Francisco. The will was admitted to probate on the 8th of October, 1860, and the sale of the property took place on November 7th, 1861. The bill to set aside the probate proceedings was filed on December 16, 1869. This Court refused relief for the reason that a court of equity will not entertain jurisdiction to set aside a will, or the probate thereof. This ruling was made on the ground that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding in rem, in which all persons in the world who have any interest are deemed parties, and are

concluded as upon *res judicata* by the decision of the probate court having jurisdiction of the property or estate; that a person, who, in contemplation of law has had his day in court and an opportunity to set up fraud, and has not done so, is forever concluded, unless he is ignorant of its perpetration, in which case he will be entitled to set it up whenever he discovers it, if not himself guilty of laches. That the statutes of California further provided that any person interested might, at any time within one year after the probate of the will, contest the same or the validity of the will, or the sufficiency of the proof, praying that the probate might be revoked. But the same statute contained a limitation that if no person should appear within one year to contest the will or probate, the latter should be conclusive, saving to infants, married women and persons of unsound mind, a like period of one year after disability removed.

It is thus apparent that in addition to the parties having had their day in Court, the California statute of limitations had also run against their claim to have the probate of the will revoked and the will declared a forgery. The contestants in that case "made no allegation that the notices of the probate of the will were fraudulently suppressed or that the death of Broderick was fraudulently concealed. The only excuse attempted to be offered is that they lived in a secluded region and did not hear of his death or of the probate proceedings. If this excuse could prevail it would unsettle all proceedings in rem." In that case the plaintiffs were chargeable with constructive notice of Broderick's death, the existence of the will, its probate, and the sale of the property, which was within the jurisdiction of the probate court, by virtue of the probate proceedings, of which legal notice was given and of which they were conclusively presumed to have notice, the probate of the will being a proceeding in rem. This is a correct application of the principles that are the foundation of all judicial pro-

ceedings in rem. The probate of the will being a proceeding in rem, the heirs of Broderick were chargeable with notice of all the facts involved in the settlement of his estate, including his death, the nature, value and amount of his property which was scheduled in the inventory of his estate, and all the events connected with the settlement of his estate, and could not, therefore, plead ignorance of their rights. But in the instant case George McManus died intestate and there is no allegation in the bill that there has ever been any administrator of his estate. The fact is that his estate has not been administered.

Teall v. Slaven, 40 Fed. 774. This was a case brought in the Circuit Court of the United States for the District of California by three plaintiffs claiming to be heirs at law of Oliver Teall, deceased, against 336 defendants, to recover an undivided interest in 1,000 lots situated in the City of San Jose, and was heard on demurrer to the second amended bill. Teall died August 12, 1857. On August 1, 1857, Devine as the attorney in fact of Teall conveyed all the property to one A. L. Rhodes, and thereafter on the same day Rhodes reconveyed the property to Devine. When Teall gave the power of attorney to Devine in 1852, the property in question was situate on the outskirts of the then village of San Jose, which at the time the suit was brought in 1889, was a city of over 30,000 inhabitants. This property had been platted into lots, blocks, streets, and alleys by the subsequent grantees of Devine, houses built on the lots, extensive improvements made, and the bill of complaint alleged that all the defendants had been in the actual adverse and exclusive possession of the property for more than 30 years prior to the commencement of the action, and during all of said time had exercised exclusive acts of dominion over the property. *Prior to the death of Davis Devine in 1876, the heirs of Teall knew that Teall was the owner of the property in 1852, and down to the time of his death in 1857. The complainants in that action knew of the claim*

of ownership of the property in controversy by Devine before his death, as it was alleged in their bill of complaint that *he fraudulently represented to them that he owned the property and that the conveyance was bona fide*. These representations were made by Devine to the Teall heirs necessarily before Devine's death in 1876, and they thus had actual knowledge of the ownership by Teall from the year 1852 down to August 1st, 1857, of the property in question, and claim of ownership by Devine thereafter to the time of his death.

The allegations of the bill of complaint in Teall v. Slaven on this point are as follows:

"That Devine died in 1876, and during his life, and after the death of Teall, he carefully concealed the truth of the facts, as alleged, from complainants, and *falsely represented to them, that the said Devine was the owner of the property described.*" 40 Federal, p. 776.

And after Devine's death, his heirs and others claiming under him:

"Concealed the truth from the complainants, and *persistently, falsely and fraudulently represented to claimants that all of said property belonged to said Devine in his lifetime.*" 40 Federal, p. 776.

Thus the heirs of Teall had actual knowledge of Teall's ownership of the property, and the claim of ownership thereto by Devine through fraudulent conveyances, more than 32 years prior to the bringing of the suit, and during all this time while San Jose was growing from a small village to a large commercial city they resolutely refrained for 32 years from bringing an action to recover the property which they knew their ancestors owned at his death and was claimed by his fraudulent attorney and son-in-law for a period of 19 years intervening between his death and Teall's. The plaintiffs in the Teall case inquired of the man whom they suspected of defrauding them, and when they were assured by him that everything was all right they refrained from further inquiry from any source which would have led them to a

knowledge of the truth. It is the established law in cases of this kind, that where a party suspects he is a victim of fraud he cannot inquire of the perpetrator thereof, acquiesce in the information received from him, and then after the lapse of years come into court and claim he had been diligent in the prosecution of his rights. Upon this state of facts the case of *Teall v. Slaven* was rightly decided.

In the *Teall* case Circuit Judge Sawyer held that it was not a question of constructive notice, but a question of diligence, where the complainants having actual knowledge of the ownership of the property by their ancestor at the time of his death had not exercised due diligence in pursuing their remedy, and that knowing of the property of their ancestor at the time of his death, they were bound to follow it up and inquire into its status before the statute of limitations had run against their claim.

Teall v. Schroder, 158 U. S. 172. This case is the appeal in *Teall v. Slaven* from the decree of the Circuit Court of the United States for the District of California, sustaining the demurrer and dismissing the bill. The following quotations from the opinion of this Court, however, show that the real ground upon which they based their affirmance of the decree of the Circuit Court was that the statute of limitations of the State of California had run in favor of the defendants, and they did not consider the question of laches.

"It is evident that Devine considered himself and acted as owner of the property, after the conveyance made to him by Rhodes, to whom he conveyed the same under the power of attorney from *Teall*. Wherever property is claimed by one as owner, and he exercises acts of ownership over it, and the validity of such acts is not questioned by his neighbors until after the lapse of many years, when the statute of limitations has run, and those who, for any apparent defects in the title of the property, would naturally be most deeply interested in enforcing their claims, make no objec-

tion thereto, a fair presumption arises, from the conduct of the parties, that the title of the holders and claimants of the property is correctly stated by them. In the present case it appears that Teall, represented as having the title, executed a power of attorney to his son-in-law, Devine, and subsequently left the state of California and settled in Syracuse, New York, leaving the property in the hands of his son-in-law in California, who afterwards claimed to be the owner thereof and exercised acts of ownership over it, unquestioned by any one, and no subsequent claim being made to the ownership by Teall or by any relative of his, not even so far as to pay or offer to pay any taxes on the property, and many years having elapsed, covering the period prescribed by the statute of limitations for instituting suits for its recovery, and rights of property to large numbers having accrued thereunder, it may be fairly presumed by the courts that the statement of the party thus exercising unquestioned ownership was correct. The holding of property under a claim of ownership for many years operates to confer a title by adverse possession, which the courts, in the interest of the peace of the community and of society generally, will not permit to be disturbed."

"The right of Devine after so many years of undisputed and notorious possession of the property, with a claim of its ownership, shuts out, under the Statute of Limitations of California, the claims of all other persons either to its possession or ownership."

Teall v. Schroder, 158 U. S. 179, 180

Hardt v. Heidweyer, 152 U. S. 547, was an action brought by a creditor to set aside a fraudulent preference made by his debtor five years after the fraudulent transfer was made. In that case the facts showed that the creditor was doing business with the debtor, and had actual knowledge of the transfers by the debtor to creditors other than himself. The plaintiff was a judgment creditor of the debtor and well knew that the debtor was hopelessly insolvent, yet never

inquired into the disposition the debtor was making of his property, although knowing that the debtor was preferring other creditors in fraud of his rights. Despite this actual knowledge of these transactions and his knowledge of the insolvency of the debtor, and the fact that he was a judgment creditor holding an unsatisfied judgment, the plaintiff persisted for five years in remaining indifferent to his rights, and it was then held that he could not enforce them against the transfer of the fraudulent debtor. We submit that this case is not an authority in the case at bar.

Holgate v. Eaton, 116 U. S. 33, was a case in which a woman through her husband made a contract to sell certain real property. Payment of the purchase price was tendered and a conveyance demanded of her at the proper time according to the terms of the contract, but she refused to convey. At that time the property was rapidly increasing in value. Two years after this, and when the property had greatly decreased in value, she sued for the purchase price, which was in effect a suit for the specific performance of the contract which she had arbitrarily refused to perform on her part. And the court held that the lady in seeking to enforce the contract when she did had been grossly negligent until altered circumstances had lost her the right to do so. We fail to see how this case is in point as an authority in the instant case.

Societe Fonciere, Etc. v. Milliken, 135 U. S. 304, was a case in which a foreign corporation was sued by a citizen of Texas, *personal service* made upon the defendant's duly authorized resident agent, attachments issued, judgments rendered, and its lands sold under executions issued on the two judgments. These judgments were rendered on June 8, 1883. On June 6, 1885, an application was made by the defendant corporation to set aside the said judgments and the sales made thereunder. To this application demurrers, general and special were filed, and the application was dismissed. The only statutory provision for setting aside a

judgment in Texas was one allowing such an application to be made and a judgment set aside within two years after judgment rendered, in cases where the judgment had been rendered on service of process *by publication*. The court held that this statute did not apply to that case. The Supreme Court then held that the defendant had failed to show an equitable ground for setting aside the judgments and sales made thereunder, and that in any event the defendant had actual knowledge of the judgments and sales of the property, and had not shown any sufficient excuse for its failure to move to set them aside for a period of two years. This is another case of a party with actual knowledge of his rights sleeping upon them, and that case was simply a proper application of the law relative to setting aside judgments, which can have no application to the case in hand.

Hays v. Seattle, 251 U. S. 233, was a case in which a contractor had entered into a contract with the State of Washington in March, 1896, which provided for the excavation by complainant of Smith's cove waterway in Seattle harbor extending through the outer harbor line through the intervening tidelands to the head of Smith's cove, the excavated material to be used for filling in and raising above high tide the adjacent tide and shore lands belonging to the State of Washington, for which the contractor was to be entitled to compensation equivalent to the cost of the work, plus fifteen per cent and interest, for which he was to have a lien upon the tide and shore lands so filled in. On March 14, 1911, the Legislature of the State of Washington passed a law establishing the port of Seattle as a municipal corporation with territorial limits, including Smith's cove waterway, Salmon bay and the intervening peninsula. This Act conferred extensive powers for the regulation, control and improvement of the harbor and navigable and non-navigable waters within such district in the interest of the public. Thereafter, and in 1913, the State,

by the statute that was under attack in that suit, enacted that the northerly part of the Smith's cove waterway should be vacated and the title thereto vested in the city of Seattle. The complainant was fully advised of this legislative measure, even prior to its enactment. After this statute took effect in June, 1913, the port commission took possession of the waterway, and exercised control over it, and did a considerable amount of excavation, filling, and bulkhead construction, having spent large sums of money therein between the taking effect of the Act in June, 1913, and November 14, 1914, when the bill of complaint in that action was filed, which was to enjoin the enforcement of the statute vacating a portion of the waterway and vesting title thereto in the municipality. The plaintiff was the possessor of a contract which he held 17 years, between March 7, 1896, and June, 1913, without attempting any substantial performance on his part of that contract, a clear case of inexcusable negligence. Seventeen months after the Legislature passed the Act repudiating the contract and destroying plaintiff's rights thereunder, the plaintiff commenced his action to enjoin the enforcement of the statute in question. In that case the plaintiff slept upon his rights of which he had actual knowledge for 18 years and 5 months, and failed for 17 years to perform a contract to which he was a party, which imposed obligations, as well as conferred rights, upon him. Furthermore, this Court in that case held that the statutes of Washington conferred a remedy upon the plaintiff by which he was assured of adequate compensation for any compensation due to him by reason of the repudiation and destruction of his contract by the State. That case is far wide of the mark as an authority in the instant case.

The case of *Bacon v. Neill*, 283 Fed. 717, was a controversy between two mining partners who were engaged in promoting, financing and managing mining properties. The defendant found what he considered was a valuable mining

claim, and asked the plaintiff to join him in its purchase and development. The plaintiff then and there declined and refused to join the defendant in acquiring the property, plaintiff alleging as his excuse therefor that climatic conditions were unfavorable to mining, that the grade of ore as disclosed by an assay of the samples was too low, that the camp was an abandoned camp and had been turned down by all reputable and competent mining engineers who had examined same, and plaintiff persisted in his refusal to join the defendant in acquiring the property. Thereafter the defendant, and other persons with whom he associated himself, purchased the property, developed it into a paying mine, and two years thereafter the plaintiff sued for an undivided one-half interest and an accounting. The court held, *after a trial on the facts*, that the plaintiff had no case on the merits, and if he had had such case his cause of action was barred by laches. This is another case of a participant in a transaction, refusing to proceed with it, standing by and awaiting results, and when the developments turned out to be profitable, claiming a share in the adventure. But we fail to see how that case can be an authority in the case at bar.

The case of Great Western Min. Co. v. Woodmas Min. Co., 14 Colo. 90, 23 Pac. 908, was a case twice tried upon the merits, and, according to the report of the case, it took over five hundred pages of testimony to demonstrate that the plaintiff had been guilty of laches. It was not decided on *inferences* from facts not found in the bill of complaint. The facts in the case showed that the property of the plaintiff corporation had been attached, judgments rendered, and the property sold in 1883, under the judgments, of all of which it had actual knowledge. The property sold under judgment was unpatented mining claims. For three years the plaintiff did no assessment work on the claims, and never made any attempt to redeem from the judgment sales, and did nothing until it commenced suit in 1886 to set aside

the judgments and the sales made thereunder. In the meantime the property had passed into the hands of innocent purchasers. The purchasers went into immediate possession of the premises, and worked and developed them, *relying*, as they had a right to rely, on the validity of the judgments, and the sales under which they procured the title, and the failure of the plaintiff to take any action to set those judgments aside until after the statutory time to do so had expired, which in the state of Colorado is within six months after the adjournment of the term at which the judgment is rendered, upon it being shown to the court that it was rendered against the party through mistake, inadvertence, surprise, or excusable neglect. This is another case where the law as to setting aside a judgment was properly applied, and we see nothing in the case that constitutes it an authority in point in the instant case.

Taylor v. Salt Creek Consolidated Oil Co., 285 Fed. 532, is a case upon which the defendants place great reliance, and if there were any similarity between the facts in that case and the instant case it would be decisive, but it cannot be decisive of the instant case, as the following facts show: That action was commenced on May 6, 1921, and the facts show that it was a case of a partner standing inactively by for a period of over eight years with full knowledge of the steps being taken by his partners in the development of the property, after he had been excluded by his partners at all times from any participation in the venture and in the profits arising therefrom. "In 1899 certain persons located the northeast quarter of section 3, township 39 north, range 79 west of the sixth principal meridian, Natrona County, Wyo., as an oil placer claim. The rights, if any, secured by such location were transferred to defendant William Hanley and to one J. B. Bradley. In March, 1912, said Hanley and Bradley met with plaintiff, Taylor, at the Brown Hotel in Denver for the purpose of considering and agreeing upon a plan for

the exploitation of said land for oil. It was then and there agreed between plaintiff, Taylor, and said Hanley and Bradley that the three would jointly go into the business of exploiting and developing such land for oil, and that they then formed what was in effect a mining partnership for said purpose. That certain apparatus was purchased and paid for by Hanley and set up on the land under the supervision of Bradley on or about June 1, 1912, and at such date the drilling operations commenced. On July 7, 1912, oil in large quantities was struck on the premises and a large flow of oil subsequently therefrom was produced in amount beyond the control of those engaged in the drilling. At no time did Hanley draw upon Taylor for Taylor's proportion of the expense, and no money was paid by Taylor, but he was ready and willing at all times to pay his part. Defendant Hanley excluded Taylor at all times from any participation in the working of said premises and from any participation in the profits arising therefrom." Taylor then, at the expiration of two years after his exclusion from the partnership, and on April 4, 1914, brought a suit against Hanley, Bradley, the Midwest Oil Company and others, seeking to enforce his rights in the profits arising from the operations on said land. This case was pending in the United States District Court of Wyoming until on or about May 15, 1916, when the same was dismissed by the court without prejudice. On August 28, 1915, the United States filed a bill in equity in the United States District Court for the District of Wyoming, against Hanley, the Midwest Oil Company and the Midwest Refining Company et al., for the purpose of obtaining a decree that the lands hereinbefore described were lawfully withdrawn from mineral location by reason of the withdrawal order of September 27, 1909, and that therefore oil had been unlawfully extracted from the claim by Hanley and his associates, and for an accounting, and at the time the suit was instituted it was stipulated by the parties

that the oil taken from the land during the pendency of the suit should be disposed of and the proceeds deposited in the bank subject to the order of the Court. That case was pending in court until April 18, 1921, when it mysteriously disappeared. Taylor did not intervene in that action, although he was claiming to be the partner of Hanley and Bradley in the claim and the oil produced therefrom. The interests of Hanley and Bradley finally passed to the Salt Creek Consolidated Oil Co., and Taylor's action against that company was an attempt to establish a constructive trust arising out of a parol agreement between himself, Hanley and Bradley, and his cause of action on that agreement arose in June, 1912. When Taylor commenced his action against the Salt Creek Consolidated Oil Co. on May 6, 1921, the situation of some of the partners had changed, the interest of the claim partners had been transferred, and a new party had succeeded to their rights, and of all of these facts Taylor had actual knowledge for a period of over eight years. Taylor also admitted in his pleadings and brief that he was awaiting the outcome of the litigation between the United States and The Midwest Refining Co., as to the validity of the Withdrawal Order of September 27, 1909, also the result of the suit brought by the United States against his partner, William Hanley, and others, on August 28, 1915, to clear the title to the land and for an accounting of the proceeds of the oil, in which Taylor claimed an undivided one-third interest. Taylor's obvious motive for not intervening in the suit brought by the United States against Hanley et al., was that if the Government had succeeded in that suit, he, as well as Hanley and Bradley, would have been liable in damages for the large amount of oil they had extracted from the premises between June, 1912, and August 28, 1915. This constituted a sinister motive for his inaction and neglect in not pressing his suit against Hanley and Bradley, and in failing to intervene in the suit brought by the Government.

This, the Court held, was a period of speculative watchful waiting on his part; that he was wilfully silent when he should have spoken, that he should have intervened in the suit of the U. S. v. Hanley, and that it was not excused by his attempt to assert his rights under the Leasing Act of 1920, when The Salt Creek Cons. Oil Co. first attempted to obtain title from the Government. It will thus be seen that the Taylor case cannot rule the case at bar, as the facts upon which the doctrine of laches was applied in that case are entirely dissimilar to the facts pleaded in the instant case, the only similarity being that they both involve claims for oil and oil land.

The case of Curtis v. Lakin, 94 Fed. 251, is also one where laches was enforced against a partner who was at all times aware of his rights, but, for prudential reasons, wanted to ascertain how developments would affect the value of the property, and, if the venture proved profitable, assert his claim, but, if unprofitable, to allow the defendants to suffer the losses.

Jackson v. Jackson, 175 Fed. 710, was a case of the neglect by plaintiff to enforce an option on certain coal lands to which she was a party, and a lying by for over three years with full knowledge of the transfer of the property and large expenditures by the purchaser of the property claiming adversely to her. This was a case of actual knowledge by a participant in the transaction of which she complained.

Naddo v. Bardon, 51 Fed. 493. In dismissing the bill in that case upon the ground of laches, Mr. Justice Brewer made the following statements which show how completely the facts in that case differentiate it from the case at bar:

"As far as appears from the bill, from the time of his removal to the bringing of this suit—20 years—he not only never saw the property, but also never did a single thing to protect his possession, or give notice of any rights in it.
 . . . *This is not a case where a party is ignorant of the property*

or his title, as if it had descended to him by inheritance through the death of an ancestor of whose death he was unaware, for he had himself taken the title from the Government, and had lived upon the property. The ignorance of the plaintiff, as disclosed by the bill, was not as to the fact, but only as to the extent of the adverse rights, and the plaintiff in this case further alleged in his bill of complaint, 'That for about ten years he had known that the said James Bardon and others claimed that he had lost and forfeited his rights to said land, and that the said Bardon refused to account to him for his transactions with regard to the same.' This is a clear declaration that for more than ten years prior to the suit he knew that his title was disputed, knew that his agent repudiated all responsibility, and yet he took no steps to enforce or even make known his rights. Surely, unless we ignore all the decisions of the Supreme Court of the United States, as well as those of other courts, in respect to the necessity of prompt action in order to call into exercise the powers of a court of equity, we must hold that *this delay of ten years after knowledge is such laches as will bar plaintiff of relief.*" . . . "Here, as we have seen, the plaintiff alleged that he knew of the existence of adverse rights, that his title was disputed, and that his agent repudiated all obligations more than ten years before he commenced this suit. And the disavowal of the trust was not by indirection, or a mere inference from the conduct of the trustees, but direct and unequivocal. *He admits that his agent and trustee claimed that he had lost all rights in the property and refused to account to him, and that he had known this fact for years. Thus he shows a known and distinct repudiation, and one of long standing.*"

Wetzel v. Minnesota Railway Co., 65 Fed. 23 (12 C. C. A. 590), was an action brought by the widow, children, and grandchildren of one George W. Remsen, who was a soldier in the Mexican War to recover an undivided interest in a tract of land in Ramsey County, Minnesota, that had been

patented by the United States to one Nathan Taylor, March 20, 1850, as assignee of Elizabeth Remsen in her own right, and as guardian of the minor heirs of George W. Remsen, deceased, of a land warrant issued by the United States to the widow and minor heirs of George W. Remsen on September 30, 1848. At the time the widow sold the land warrant in 1848 the eldest child of George W. Remsen was 17 years, and the youngest 11 years of age. The land warrant was assigned to Taylor without the order or approval of the orphans court by which Elizabeth Remsen, the widow, and a plaintiff in the action, was appointed guardian of the minor children. It was upon this ground only that they sought to have the conveyance by the United States to Taylor, of the land on which he had located the land warrant, set aside. Forty-two years later the widow, some of the children, and the grandchildren of some of the deceased children of George W. Remsen, sought to set aside the conveyance of the United States to Taylor. It is obvious in this case that the widow and the eldest daughter had the land warrant in their possession, knew that it could be located by the assignee thereof at any time after its transfer and as the family lived together in the same town forty-two years it was almost a certainty that the younger children knew of the issuance of this land warrant to their mother and its sale by her, and the use of the proceeds by her in their maintenance, and yet they delayed for thirty years after the youngest child became of age to take any action to have the transfer of the warrant set aside upon the ground that its sale had not been ordered and approved by the orphans court in compliance with the statutes of the United States applicable thereto. These facts show actual knowledge, at least by the widow and the eldest child, of their rights in the premises. The Circuit Court of Appeals of the 8th Circuit in deciding the case held, *after a careful consideration of the evidence, the case having been tried on the merits*, that from a review of all the testimony

in the case it was improbable that the younger children did not know of the fact that their father was a soldier in the Mexican war, and that the land warrant had been issued to and received by their mother in 1848, and having known of their father's service in the Mexican war, they were chargeable with knowledge of the law which gave him, or his widow and children, the right to 160 acres of land to be located by a land warrant, as was done in that case. That thus knowing the facts, and being chargeable with knowledge of the law applicable thereto, the younger children were guilty of laches in refraining for 30 years after the attainment of their majority to bring an action to enforce their rights on the sole ground that the orphans court had not ordered and confirmed their mother's act in assigning the land warrant to Taylor. And the further fact that the cities of Mineapolis and St. Paul had grown up in the immediate vicinity of the place where Taylor had located the warrant and there had been 1200 transfers of the property in question, without anything appearing on record in Ramsey County, Minnesota, where the property was located, to show that Taylor had not a perfect title to the property under his patent from the United Staes. That case cannot be considered as an authority applicable to the case at bar.

The case of *Sturm v. Weiss*, 273 Fed. 457, is cited as an authority by the defendants on the proposition of laches. The facts of that case, as to laches, were that the stockholders of a bankrupt corporation authorized the sale of its assets, three oil leases, to pay the debts of the company to some of its officers. Suit was brought on the notes of the company, its property sold to satisfy the indebtedness, and the purchasers, relying on the validity of the proceedings and the authorization thereof by the complaining stockholders, expended large sums in producing oil on the property. Six years after authorizing the sale of the company's property, and with full knowledge of the sale and

its purchase and development at great expense by the defendants in that case, some of the stockholders sought to enforce their rights, as such, in the property. Held, that they were estopped by their conduct and silence to challenge the validity of the transfer they had authorized, as to those of the purchasers of the property who were not officials of the company. *Strum v. Weiss* is very similar in its facts to the case of *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, in that it was a suit, in effect, to set aside a judicial sale brought by the stockholders of a defunct corporation, after authorizing and acquiescing in the sale of its property, and then standing by to see whether the developments undertaken by the defendants would be successful before deciding whether to assert their claim.

The defendants cited such cases as:

Swift v. Smith, 79 Fed. 709
Williamson v. Beardsley, 137 Fed. 467
Jewell v. Trilby Mines Co., 229 Fed. 98

Those were all cases where heirs were seeking to recover a portion of their ancestor's estate after administration of the estate, or the probate of a will, left by the ancestor, and in which cases the heirs had actual knowledge of the administration or probate proceedings, knew of the existence of the estate left by the ancestor, knew of the will of the testator, its provisions, and the granting of letters testamentary thereon. In one case, *Swift v. Smith*, *supra*, receiving a partial distribution of the estate, and in the case of *Jewell v. Trilby Mines Co.*, *supra*, actually receiving the proceeds derived from the sale of the identical property which they were then seeking to recover that had been sold by the administrator under the order of the probate court, and in the case of *Williamson v. Beardsley*, *supra*, the heirs knew of the will of the testator, its provisions, and the granting of letters testamentary in 1883, and therefore knew that administration upon the estate had

begun and was in course. If those facts are not sufficient to differentiate those cases from the instant case, and render them totally inapplicable as authorities herein, then indeed, is the law, *and equity*, a "lawless science," a "codeless myriad of precedents," and a "wilderness of single instances," without form and without reason.

THE PLAINTIFF IS NOT A SPECULATIVE PURCHASER.

The defendants in their brief in the court below attempted to raise the question that the plaintiff is a speculative purchaser in the following words: "Plaintiff's purchase of the alleged interest of the widow and heirs of George McManus, for a consideration which he refrains from disclosing, was a mere speculative purchase." There is not a syllable in the bill of complaint or anywhere in the record in this case upon which to base such a contention. The allegations of the bill of complaint on this subject are that the widow and heirs of George McManus, "for a good and valuable consideration to them paid by this plaintiff, did grant, sell and convey to this plaintiff, his heirs and assigns, by proper deeds of conveyance, duly executed, delivered, acknowledged and recorded, all their right, title, interest, estate and demand," etc. in and to the premises in controversy. (R. 8.) That is a sufficient allegation that the plaintiff paid value, to withstand an attack by a motion to dismiss. If the defendants honestly desired to know what the actual consideration is that the plaintiff paid, they had their remedy and an instrument of disclosure, in a motion for "further and better particulars" of this matter, and to make the bill of complaint more definite and certain in that respect. But the defendants were not "frank enough," to avail themselves of that remedy provided by Equity Rule 20, but took the disingenuous mode of raising the question by argument and inference as to speculative purchase. But the defendants did file a motion to dismiss, and thereby elected to take the bill of complaint as it is found in the record, and by that motion they admitted all facts well pleaded, including the fact that the plaintiff is a purchaser for a valuable consideration, and it does not now lie in their mouths to urge that the plaintiff was "not frank enough to disclose," the specific amount of consid-

eration he actually paid. The entire argument of the defendants on this point, is palpably an afterthought on the part of their counsel to bolster up the weakness of the cause by which they are oppressed, was doubtless suggested to them by the cases of *Jenks v. Quidnick Company* and *Sturm v. Weiss*, which we shall hereafter deal with, and finds no support in the record in this case. The phrase "a valuable consideration," has a well-known meaning in law, and that meaning cannot be distorted by means of inadmissible and biased inferences drawn by a prejudiced antagonist who bases his entire argument on the insinuation that his adversary is not frank. "Valuable consideration," means, and necessarily requires, under every form and kind of purchase, something of actual value, capable, in estimation of the law, of pecuniary measurements; parting with money or money's worth, or an actual change of the purchaser's legal position for the worse.

2 Pomeroy's Equity, Sec. 747

McDonald & Co. v. Johns, 62 Wash. 521

Waskey v. Chambers, 224 U. S. 564

It is obvious that by the use of the phrase "speculative purchase," the defendants are attempting to mislead their supposedly ignorant adversary as to the real principle of equity they seek to invoke on this branch of the case. They are really asking the court to apply the familiar maxim that "He who comes into equity must come with clean hands." This maxim assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject matter or transaction in question. Without even the flimsiest pretext of candor the defendants are asking the court to say that this plaintiff has violated conscience or good faith or some other equitable principle in his conduct concerning the defendants and the subject matter of this suit. We now ask, Is

there anything to be found in the bill of complaint, in this record, or in the plaintiff's conduct of this litigation, that even remotely hints that the conduct of the plaintiff in connection with the subject matter of this action or to the defendants has been unconscientious, or unjust, or iniquitous, or marked by want of good faith, or that he has violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain? Candor, frankness, and truth answer, Nothing! It should be remembered that this maxim, which the defendants seek to invoke, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is not connected with the matter in litigation, and with which the opposite party has no concern. To what fraud, inequitable conduct, or misconduct, or transgression, or iniquity on the part of the complainant in regard to the defendants, or to the transaction which is the subject of this controversy do the defendants refer, that has even a shadowy outline in the record in this case? The defendants have utterly failed, and could only fail, to point out any allegation in the bill that even remotely tends to give form and substance to their uncandid and disingenuous argument. The defendants cannot point out any conduct on the part of the plaintiff in regard to the defendants, or any other person connected with the subject matter of this action, of such a character that the prosecution of the plaintiff's rights will of itself involve the protection of wrongdoing. What iniquity has the plaintiff done to the defendants themselves, and done in regard to the matter in litigation? Nothing, unless bringing a meritorious action to compel the defendants to disgorge their ill-gotten and illegal gains, is such

an iniquity. The defendants in raising this point are obviously in the position of the fox who draws a red herring across his trail in an endeavor to throw his pursuers off the scent. In what manner has the plaintiff infringed the rights of the defendants in seeking to enforce the just rights of the defrauded heirs of George McManus? How, in procuring those rights and in bringing an action to enforce them, has the plaintiff been guilty of fraudulent or improper conduct toward the defendants? The owner of property that he has lawfully acquired, and of which he has been unlawfully deprived by the defendants, has a right to bring suit to recover it, and the motive which prompts him to sue is not open to judicial inquiry, because, having the legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for his attempt to assert his legal rights. The exercise of the legal right cannot be affected by the motive which controls it.

“The rule that one coming into equity must come with clean hands is confined to the conduct of the party in the matter before the court, and not to matters aliunde. Courts of equity, as well as courts of law, will not refuse redress to the suitor because his conduct in other matters not then before the court may not be blameless. It is enough if the suitor shows that he has acted justly, fairly and legally in the subject-matter of the suit. The iniquity must have been done to the defendant himself, and must have been done in regard to the matter in litigation.”

Bonsack Mach. Co. v. Smith, 70 Fed. 384, 386
Cunningham v. Pettigrew, 169 Fed. 335, 344
Chute v. Wisconsin Chemical co., 185 Fed. 118
Knapp v. S. Jarvis Adams Co., 135 Fed. 1010
1 Pomeroy's Equity, Secs. 397-399

“The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a

suitor of a right to justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 170

Camors Co. v. M'Connell, 140 Fed. 412, 417

Strait v. National Harrow Co., 51 Fed. 819

Woodward v. Woodward, 41 N. J. Eq. 224

We now come to the cases of *Randolph v. Quidnick Co.*, 135 U. S. 457, and *Sturm v. Weiss*, 273 Fed. 457. As the defendant's counsel based their argument in the lower court on two short excerpts from these cases, and not upon facts found in the record, we may now inquire whether they are pertinent as authorities applicable to the facts pleaded in the bill of complaint in this action. *Randolph v. Quidnick*, supra, was an action brought by Evan Randolph for the purpose of establishing his title to 4,022 shares of the capital stock of the Quidnick Company, claiming to have purchased these shares at execution sale in March, 1883, for \$275. The Quidnick Company was a corporation organized under the laws of Rhode Island with a capital stock of \$500,000 divided into 5,000 shares. Prior to December 1, 1873, the corporation had purchased some of its own stock, so that there was then outstanding only 4,349 shares, of which 327 were held by the estate of Edward Hoyt, deceased; and the remainder, being the 4,022 shares in controversy by Amasa, William, Fanny and Mary Sprague, and the A. & W. Sprague Manufacturing Company. At this time the Spragues, who were largely engaged in manufacturing and other business, became embarrassed, and executed an assignment of all their property to a trustee for the benefit of creditors, to which nearly all the creditors assented. The interests involved were immense. The committee of creditors appointed to examine into the assets and liabilities reported the former at \$19,-

495,247, and the latter at \$11,475,443. These assets were various in character—manufacturing stocks, real estate, stock in banks and other corporations, including the stock of the Quidnick Company to which Randolph and Waterman sought to establish their title in that suit. The transfer by the Spragues of the stock in the Quidnick Company to the trustee for the benefit of their creditors was made in 1873. The purchase of the stock in the Quidnick Company claimed to have been made by Randolph and Waterman was in 1883. The executions under which the stock was purchased, were issued upon two judgments, one in favor of Randolph and the other in favor of Waterman, each a creditor at the time of the transfer in 1873. Randolph commenced his action in October, 1875, as a personal action against the Spragues. After service of summons, nothing seems to have been done until the 14th of August, 1882, at which time an attachment was issued and an attempted levy made upon the stock. Judgment was rendered March 7, 1883. Waterman commenced his action in October, 1882, and immediately thereafter placed an attachment on the stock. It will thus be perceived that these creditors made no attack upon the validity of the transfers until 1882, nearly nine years after they had been executed, when nearly all the creditors had accepted the provisions of the transfers; and the trustee, in consequence of the duties imposed upon him by the transfers, had done nearly \$30,000,000 of manufacturing business, besides managing and disposing of other properties transferred. The transfers contemplated no preference between creditors, and were for the benefit of all alike who assented to their provisions. When the executions of Randolph and Waterman were levied upon the stock of the Quidnick Company it was entirely solvent, out of debt, and the owner of large properties. Its stock was valued, by a committee of the creditors of the Spragues, at \$374 a share; and the dividends which, in the winter after the filing of this bill, the

stock was entitled to as the proceeds of the sale of property and otherwise, amounted to over half a million dollars. In other words, the complainants in that action were asking interposition of a court of equity to establish their title to property worth over half a million dollars obtained by purchase at execution sales under peculiar conditions for \$275. Upon those facts the Supreme Court of the United States held: (1) That the transfer of the stock of the Quidnick Company in question to the trustee for the creditors of the Spragues was valid, and transferred the title to the trustee, and Randolph and Waterman took nothing by their levy and sale of the Quidnick stock; (2) That the delay of Randolph and Waterman to enforce their claim for nine years after the transfer of the Quiknick stock to the trustee for the benefit of the Sprague creditors with actual and full knowledge of all the facts, constituted laches; (3) That the purchase of stock representing property valued at over half a million dollars for a bid at an execution sale of \$275 was an unconscionable speculation, and it was such, in that case, for the reason as stated by Mr. Justice Brewer in his opinion that: "The immense disproportion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. *Some rights must have suffered and some wrongs must have been done by such a transaction, and a court of equity properly says that it will not lend its aid to further such an unconscionable speculation. . . .* So his purchase is one simply to speculate upon the chances of successfully attacking transfers of large property, made for the benefit of creditors, and with the view of depriving them of the benefits of such transfers. It is a case where equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure, *or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings*

theretofore taken. . . . If they were not satisfied with the legality and equity of the proceedings, they should have antagonized them sooner. Equity loves equality; and if they did not believe that these proceedings were legal and equitable, they should promptly have invoked the aid of the bankrupt court or made other assertion of their legal rights. They might not equitably wait the outcome of the proceedings, expecting to approve if they worked out full payment of all creditors, and ready to attack if the scheme proved a failure. *Good faith to other creditors required that they act promptly.* We do not rest this upon any mere Statute of Limitations. Equity, however, administers its remedies in accordance with its own rules, affirms that the best of rights may be lost by unreasonable delay in their assertion, and, when coupled with long delay, *is a scheme for great personal gain at the expense of equally deserving creditors*, it refuses to lend its aid to the accomplishment thereof."

If there are any facts alleged in the bill of complaint that can support any inference that the plaintiff in this case has been speculating upon a bankrupt estate at the expense of other equally deserving creditors, or that by the purchase of the title and estate of the heirs of George McManus, *some rights must have suffered and some wrongs must have been done by such a transaction*," or that the plaintiff has paid \$275 for property representing over half a million dollars, to the detriment of the defendant in this action, such facts have not been pointed out in this record, and to apply the decision in *Randolph v. Quidnick Co.*, supra, to the instant case, would not only be unconscionable, but would overthrow a just and equitable title that has not the slightest taint of fraud, iniquity, or any other improper or wrong conduct in the particular matter in which judicial redress is sought in this action.

The case of *Sturm v. Wiess*, 273 Fed. 457, in one of its aspects, was a contest between two stockholders of a defunct and insolvent corporation to share in its assets that

had been recovered by means of that suit. The facts in that case show that one J. W. Sturm and Fred Fleming were stockholders, and Sturm was the president and a director, of the Tex-I-Kan Company, a Texas corporation which was incorporated in May, 1904. In July, 1909, the proper state official, acting under a Texas statute, declared that the company had forfeited its franchise rights as a corporation to do business, and since that time it has been defunct. Prior to that time the corporation was hopelessly insolvent. In January, 1908, its stockholders at a meeting authorized the officers of the company to realize on its assets and to pay its debts. Previous to that time Sturm had loaned the company money, had also purchased notes of the company given to one of its stockholders, and one Sloan, who was secretary and treasurer of the company held the company's note for \$1,080. The company indebtedness represented by these notes was assigned by Sloan and Sturm to one Sharp, who recovered a judgment thereon in July, 1909, in an action begun in December, 1908, in the United States Circuit Court of Oklahoma against the Tex-I-Kan Company, for \$14,505.41. All the property and assets of the corporation were sold on execution sale under this judgment in January, 1910, and bought in by Sharp for \$4,716. The United States Marshal delivered his deed, dated February 18, 1910, conveying to Sharp the property sold, and Sharp thereafter, in October, 1911, conveyed all he had purchased to J. W. Sturm. Thereafter Sturm handled the property as his own and interested other parties in the matter in 1912, and those parties put in a large amount of money and developed the property that formerly belonged to the corporation so that it produced several paying oil wells. Sturm died in November, 1912, one year and seven months before the bringing of that suit. In the meantime, Fleming, who had owned 82 $\frac{2}{3}$ shares of the company's stock prior to May, 1908, was in that month adjudged a bankrupt, and the title to his 82 $\frac{2}{3}$ shares thereupon became vested in his

trustee, and those shares, along with other odds and ends of Fleming's bankrupt estate, were sold for \$500, to three gentlemen who took them as trustees for the creditors of a bank in which Fleming had theretofore been largely interested and which had failed. Thereafter, and in 1911 or 1912, the exact date not being definite in the record, Fleming through a man by the name of White, who lived in Oklahoma, and was a stranger to the three trustees, who lived in Texas, purchased from these three trustees the certificate for $82\frac{2}{3}$ shares of the stock formerly held by Fleming for \$25. White told the trustees at the time of this purchase that all the property of the Tex-I-Kan Company had been sold and Fleming testified that he knew at the time White made the purchase that all the company's property had been sold. Later the trustees were informed that the shares might become of considerable value. They thereupon complained to Fleming and called his attention to the fact that they had been induced to sell for a nominal sum on the representation that the shares had little if any value, whereupon Fleming made a written contract with the trustees that he would give back to them one-half of the net amount which he might eventually receive for the shares. That suit was instituted in April, 1914, by certain stockholders of the defunct corporation, including Fleming, to recover from the estate of J. W. Sturm and the parties, J. E. Crosbie and G. S. Davis, to whom he had sold the defunct corporation's property under the Sharp judgment, and retained a half interest for his own benefit. The decision of this Court in that case, aside from its decision as to Fleming's rights, was that Sturm occupied a fiduciary relation to the other stockholders, and that his estate must account to them for their proportionate share of the property and money he had received from the sale of the property and his transaction with Crosbie and Davis. This allowance of a recovery to those stockholders, and not a recovery to Fleming, was doubtless based on the proposition that they had al-

ways retained their stock, even while they stood idly by for a period of six and one-half years and allowed Sturm and Crosbie and Davis to develop the property and make it a paying proposition. But Fleming had parted with his stock in 1908, after the insolvency of the corporation, and shortly prior to its being declared defunct, and had also stood idly by for a period of over four years watching the developments of the property by Sturm, Crosbie and Davis into a paying proposition, and when he saw that oil was being produced in paying quantities he purchased back his former stock for the sum of \$25, doubtless on fraudulent representations made by his agent that it had no value. Fleming then, like the other stockholders, waited for two years and a half more, during the crucial period, before taking any steps as a stockholder of the defunct corporation to make known or assert his rights, and that constituted a culpable standing by, as this Court said, with "shut eyes and hand on mouth," awaiting developments. It may be further noted that in that case none of the stockholders were allowed to recover against Crosbie and Davis, but only against the estate of Sturm, the deceased president and stockholder of the company, on the ground of the constructive trust raised by his fiduciary relation to them. In that case Fleming was a speculative purchaser in every sense of the word, was guilty of laches in every sense of the word, was guilty of bad faith towards his creditors from whom he purchased the stock, and towards his brother stockholder Sturm, from whose estate he sought to recover.

If the record in the case at bar shows that this plaintiff has engaged in any such transaction as the above, and been guilty of any such *mala fides*, then that case would be applicable as an authority in the instant case. But no such case is now before this court, nor can any of the facts found in this record, upon which this case must be tried, be tortured, even by the ingenuity the defendant's counsel, into showing such a condition of affairs.

THE PLAINTIFF IS NOT GUILTY OF MAINTENANCE.

In their brief in the court below the defendants urged that the plaintiff is guilty of maintenance, in the following words:

“At common law, the conveyance of lands held adversely by a third person was an offense punishable by fine and imprisonment. This doctrine of the common law was emphasized and its penalties increased by the statute of 32 Henry VIII, Chapter XI, which added forfeiture in favor of the Crown, and punished both parties to the attempted conveyance. Maintenance, as a common-law offense, has never been abrogated by statutory enactment in Wyoming.”

A short answer to this remarkable statement of the defendants is found in Section 4583 of Wyoming Compiled Statutes, 1920, which is as follows:

“Sec. 4583. Adverse possession not to invalidate conveyance. No grant or conveyance of lands or interest therein shall be void, for the reason that at the time of the execution thereof, such land shall be in the actual possession of another, claiming adversely.”

Also the following quotation from the case of *Burnes v. Scott*, 117 U. S. 582, as follows:

“It further appears from the bill of exceptions that in support of the plea that the plaintiff had made a champertous agreement with his counsel for the prosecution of this suit, the defendant offered evidence which tended to prove a contract made by the plaintiff with his counsel, George W. De Camp, by which the latter agreed to prosecute the suit and defray all the expenses thereof, in consideration of which he was to receive a certain proportion of the sum recovered. The court, however, did not give effect to this plea and overruled a motion made by the defendant to dismiss the action on the ground that the plain-

tiff had made such champertous contract. This action of the court the defendant assigns for error."

"At common law and by statute both in England and in many of the United States, champerty was a criminal offense. But at the present time, in most of the States, to aid the lawful suit of another with money or services, in consideration of a share in the recovery, is not considered or punished as a crime. But in many of the States champertous contracts are considered void. This is the case in Missouri where the present case was tried, the supreme court so holding, on the ground that the common law had been adopted by statute in that State. See *Duke v. Harper*, 66 Mo. 51. The defendant now asks us to go a long step beyond this ruling."

"The question raised by the present assignment of error is not whether a champertous contract between counsel and client is void, but whether the making of such a contract can be set up in bar of a recovery on the cause of action to which the champertous contract relates."

"We must answer this question in the negative. It was wisely said by the Supreme Court of New York, in the case of *Thalhimer v. Brinkerhoff*, 3 Cow. 623, that 'The right of litigation may be abused, and proper remedies for groundless and vexatious litigation must exist; but the remedies for the abuse of this right should be such as not to impair the free use of the right itself. As the justice or injustice of the claim cannot be known before the termination of the cause, the checks upon unjust litigation must in general consist, not in excluding the suit or the suitor from the courts, but in redress following the decision of justice upon the merits of the case.' "

This is in accord with the views of this court. The precise question under consideration was decided in the case of *Boone v. Chiles*, 10 Pet. 177 (35 U. S. bk. 9, L. Ed. 388.) That was a bill in equity to establish the title to a tract of 700 acres of land in Bourbon County, in the State of

Kentucky. Among other defenses it was alleged that an agreement in writing had been made between Boone, the plaintiff, and one Engles, by which Engles undertook at his own expense to prosecute a suit for the 700 acres in dispute; and as a consideration for his trouble was to have one-half of the land, and that the suit was prosecuted under that agreement; that it was, therefore, a case of champerty and maintenance forbidden by law, in which the court could give no relief. But the court held that, although the English Statutes which had been adopted in Kentucky punished the offense and declared the contract for maintenance void between the parties, the right of the plaintiff was not forfeited by such an agreement; and it might be asserted against the defendants whether the contract with Engles was valid or void. The same rule has been declared in other American cases. *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Robison v. Beall*, 26 Ga. 17; *Allison v. C. & N. W. Railroad Co.*, 42 Iowa 274."

Burnes v. Scott, 117 U. S. 588, 590

Watkins v. Sedberry, 261 U. S. 573, 577

This question was also considered by the Circuit Court of Appeals of the Eighth Circuit, in connection with the Colorado statute on the subject of maintenance, in the case of *Rucker v. Bolles*, 80 Fed. 504, 510. The Colorado statute considered in that case is in the following words:

"If any person shall officiously intermeddle in a suit at common law or in chancery, that in nowise belongs to or concerns such person, by maintaining or assisting either party with money or otherwise, to prosecute or defend such suit, with a view to promote litigation, every such person so offending shall be deemed to have committed the crime of maintenance, and upon conviction thereof, shall be fined and punished as in cases of common barratry. . . ."

Mills' Ann. St. Colo. 1891, Sec. 1299

We quote the following excerpt from the opinion of Circuit Judge Thayer on this point in that case:

“A more debatable question is whether the demurrer to the third defense was properly sustained. By that defense the pleader endeavored to show that the contract in suit was void for champerty and maintenance. We are of opinion that the contract on its face was not void on either of the grounds last mentioned, whether the question be considered in the light of the Colorado statute concerning maintenance, or in the light of the common law as generally understood and enforced in this country. The agreement, by its terms, purports to be no more than a sale by Rucker to Bolles of a one-fourth interest in a judgment for money which he (Rucker) might recover in a pending lawsuit. Bolles did not agree to furnish any aid or assistance in the prosecution of the suit against Wheeler, or to interfere with the litigation in any way, the agreement being, on the contrary, that Rucker should prosecute said suit at his own proper cost and expense. Nor was there any agreement that Rucker should devote the money which he had received from Bolles to the further prosecution of the suit against Wheeler and others. The former was at full liberty to appropriate it to any other use which he saw fit, and, for aught that appears he may have devoted it to other uses. Furthermore, Rucker did not bind himself not to compromise the pending suit if he received a favorable offer of compromise, which he desired to accept, the only stipulation in that behalf being that, if the suit was compromised, Bolles should receive not less than \$75,000 on paying to Rucker an additional \$10,000. The purpose of this stipulation would seem to have been not to prolong the litigation, but to secure to Bolles an adequate return for his money, considering the character of the investment. We are not able to say that this contract discloses an officious intermeddling by a third party in a suit which in no wise concerned him, with a view to promote litigation, within the meaning of the Colorado statute on the subject of maintenance, for, according to the modern view, a person has a

right to assign an interest in a chose in action which he happens to own, and this right exists although the claim happens to be litigated. The old rule that choses in action are not assignable has not only been abolished, but the prevailing doctrine is that causes of action for torts to property, real or personal, which survive to executors or administrators, are also assignable. *Snyder v. Railway Co.*, 86 Mo. 613; *Pom. Rem. & Rem. Rights*, Sec. 147. Under a variety of circumstances which may be supposed, a man might find it necessary to sell or hypothecate an interest in a claim which happened to be in litigation for the purpose of raising money wherewith to prosecute his business successfully, or to assert or defend his rights in the courts; and it would be a great hardship if he were denied the right to raise money by such means, or if money so obtained could not be recovered. We can perceive no reason, therefore, founded either on considerations of public policy or the terms of the Colorado statute, why the contract sued upon should be pronounced invalid."

Rucker v. Bolles, 80 Fed. 510, 511

We may add that there is no statute on the subject of maintenance in the State of Wyoming.

We think the foregoing argument sufficiently covers all the errors assigned, being Assignment of Error No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, and No. 12, and we respectfully submit that, for the manifest errors appearing on the face of the record, the judgment of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed, and this cause remanded to the District Court of Wyoming for further proceedings in accordance with law.

Respectfully submitted,

J. M. HODGSON,
F. E. PENDELL,
Attorneys for Appellant.

APPENDIX

APPLICABLE STATUTES

The application, construction, and effect of the following statutes of the United States are directly involved in this action:

R. S. Sec. 2319. "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

R. S. Sec. 2320. "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other."

R. S. Sec. 2322. "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in con-

flit with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical sidelines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the endlines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

R. S. Sec. 2324. "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine

upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures. Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, Anno Domini eighteen hundred and seventy-two."

R. S. Sec. 2325. "A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Surveyor General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes,

notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States Surveyor General that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits. And provided, That this section shall apply to all applications now pending for patents to mineral lands."

R. S. Sec. 2326. "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty

days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

R. S. Sec. 2329. "Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

R. S. Sec. 2330. "Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred

and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona-fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona-fide settler to any purchaser."

R. S. Sec. 2331. "Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes."

R. S. Sec. 2332. "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent."

OIL LEASING ACT OF FEB. 25, 1920
41 Stat. at L. 437

Act Feb. 25, 1920, 41 Stat. 437, Sec. 1. "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961),

and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: * * *."

Act. Feb. 25, 1920, 41 Stat. 437, Sec. 18. "That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to any oil or gas-bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than $12\frac{1}{2}$ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: Provided, That not more than one-half of the area, but in no case to exceed three thousand two hundred acres, within the geologic oil or gas structure of a producing oil or gas field shall be leased to any one claimant under the provision of this section when the area of such geologic oil structure exceed six hundred and forty acres. Any claimant or his successor, subject to this limitation, shall, however, have the right to select and receive the lease as in this section provided for that portion of his claim or claims equal to, but not in excess of, said one-half of the area of such geologic oil structure, but not more than three thousand two hundred acres.

"All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the execution of such lease shall be fixed by the Secretary of the Interior under appropriate rules and regula-

tions: Provided, however, That as to all like claims situate within any naval petroleum reserve the producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof, upon the terms and payment of royalties for past and future production as herein provided for in the leasing of claims. No wells shall be drilled in the land subject to this provision within six hundred and sixty feet of any such leased well without the consent of the lessee: Provided, however, That the President may, in his discretion, lease the remainder or any part of any such claim upon which such wells have been drilled, and in the event of such leasing said claimant or his successor shall have a preference right to such lease: And provided further, That he may permit the drilling of additional wells by the claimant or his successor within the limited area of six hundred and sixty feet theretofore provided for upon such terms and conditions as he may prescribe.

"No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

"Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled, An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest," approved March 2, 1911, approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: Provided, That no claimant acquiring any interest in such lands since September 1, 1919, from a claimant on or since said date claiming or holding more than the maximum allowed claimant under this section shall secure a lease thereon or any interest

therein, but the inhibition of this proviso shall not apply to an exchange of any interest in such lands made prior to the 1st day of January, 1920, which did not increase or reduce the areage or acreage held or claimed in excess of said maximum by either party to the exchange: Provided further, That no lease or leases under this section shall be granted, nor shall any interest therein inure, to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for."

Act Feb. 25, 1920, 41 Stat. 437, Sec. 32. "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act: Provided, That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

RULES AND REGULATIONS

Regulation No. 24, is found printed in full on page 134 of this brief.

Regulation No. 24½, is found printed in full on page 133 of this brief.

Regulation No. 28. Adverse or Conflicting Claims—Procedure. "In case of adverse or conflicting claims for leases under Section 18, 19, or 22, or permits under Section 19 or 22, the Secretary of the Interior is clothed with authority to grant leases or permits, as the case may be, to one or more of them, as shall be deemed just.

(a) To have their claims considered in connection with the awarding of leases or permits it will be necessary for adverse claimants to make full showing (1) of a superior right to a lease or permit under this act, or (2) a superior right under some other public land law. If the former, the conflicting claimant must make out a complete case in his own behalf as required by these regulations on or before August 25, 1920.

(b) Upon receipt of the application and showing of an adverse claimant the Commissioner of the General Land Office will consider same. If, in his judgment, the adverse

claimant has failed to make a prima facie case showing that he is entitled to a lease or permit, as the case may be, for at least part of the land, his application will be rejected, subject to appeal to the Secretary of the Interior. But if the adverse claimant makes out a prima facie case the Commissioner will take such course as may be advisable under the circumstances of each particular case to settle and adjust the rights of the respective parties, and may, if deemed necessary, order a formal hearing to settle disputed questions of fact. In the absence of appeal to the Secretary of Interior from the final order or decision of the Commissioner same shall be conclusive.

ERRATA

The words, "this Court," should be "the Circuit Court of Appeals" on line 28 of page 337 and on line 17 of page 338.



FEB 16 1927

WM. E. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. 106

JAMES M. HODGSON, APPELLANT,

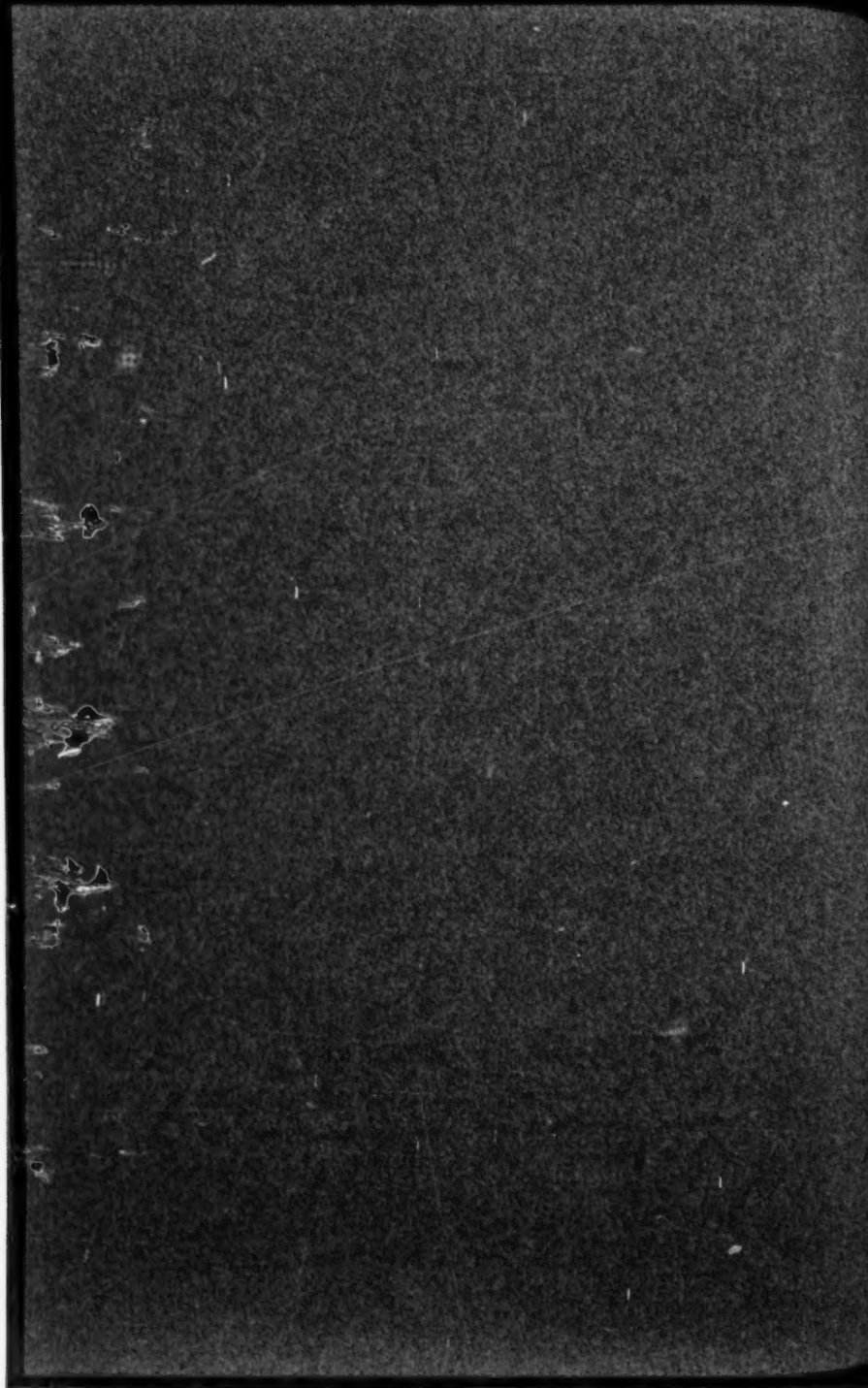
vs.

FEDERAL OIL AND DEVELOPMENT COMPANY AND
THE MOUNTAIN AND GULF OIL COMPANY,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLANT.

J. M. HODGSON, of Denver, Colo.,
F. E. PENDELL, of Denver, Colo.,
Attorneys for Appellant.



Supreme Court of the United States

OCTOBER TERM, 1926

No. 166

JAMES M. HODGSON, APPELLANT,

vs.

FEDERAL OIL AND DEVELOPMENT COMPANY AND
THE MOUNTAIN AND GULF OIL COMPANY,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLANT

The appellees, after serving their brief on January 13, 1927, in this case, served upon counsel for appellant on February 2, 1927, a printed page, constituting an additional brief, which they label as an "Addendum." In this "Addendum" brief they cite two cases from the U. S. Circuit Court of Appeals for the 9th Circuit, viz., *Wilson v. Elk Coal*

Co., 7 F. (2d) 112, decided August 3, 1925, and a sister case *Proctor v. Painter et al.*, 15 F. (2d) 974, decided November 15, 1926.

Counsel for appellees in their "Addendum" say that these cases "deal with facts analogous to the facts presented by this record," and that, "We cite these two cases with special reference to the section of our brief dealing with the United States as an indispensable party." Counsel for appellees further state in their "Addendum" brief: "The suits were in equity to impose constructive trusts upon the leases."

In view of these bizarre statements of counsel for the appellees, it becomes necessary to examine these two cases and the facts upon which they were decided, in order to ascertain whether or not they are authorities in favor of the appellees. An examination of the facts, and the objects sought to be attained in those cases, clearly shows that they are not authorities that in any way support the contentions of appellees, as the facts in those cases are not analogous to the facts presented in the case at bar, and the object of those cases was not to impose constructive trusts upon the coal leases issued under the Leasing Act of February 25, 1920, involved in those cases.

In *Wilson v. Elk Coal Co.*, 7 F. (2d) 112, it appears that plaintiff and appellant, prior to June 27, 1916, operated and improved a coal mine on the SW $\frac{1}{4}$ of Sec. 34, Township 22 N., Range 7 E. W. M., and was in actual possession thereof, and on the latter named date filed a coal declaratory statement and claimed the coal on the lands described under Secs. 2347 and 2348 of the Revised Statutes of the U. S. On July 23, 1917, Wilson filed his application to purchase, based on his preference right of entry and his continued possession and improvement of the lands, and tendered to the local Land Office the sum of \$3,200 in payment of the purchase price. His entry was denied, and he appealed successively to the Commissioner of the General Land Office

and the Secretary of the Interior, who on June 23, 1922, finally rejected Wilson's application.

In his Bill of Complaint in that action the plaintiff and appellant prayed "a decree reserving said coal deposits to himself," and enjoining the defendant from operating on said lands. (See statement of facts by District Judge Neterer in 300 Fed. 474.) On page 113 of 7 F. (2nd) the U. S. Circuit Court of Appeals states that:

"The prayer of the complaint is that the appellee be declared a trustee for the appellant or, in the alternative, that the lease be canceled, and for general relief."

The appellee in that case, the Elk Coal Co., claimed under a coal lease granted under the Leasing Act of February 25, 1920 (41 Stat. 437) covering the West half and other portions of said section 34. On February 13, 1922, the Land Department gave notice of this application and directed all persons having claims to the land, or any part thereof, to file their claims or protest in the local Land Office not later than March 28, 1922. The appellant filed a *formal protest* against the mining lease, setting forth his own claim (then pending under the old law before the Secretary of the Interior) to a part of the land. These proceedings culminated on September 12, 1922, in the execution and delivery of a lease to the appellee, three months after the Secretary of the Interior had finally rejected the application of the appellant for a patent to the land, under the coal land law existing prior to February 25, 1920.

In his complaint in that action the appellant Wilson set up his rights under the pre-existing coal land law and the right to a patent thereunder, initiated on June 27, 1916, by the filing of his coal declaratory statement, and claim to the coal in the lands described, followed by an application for purchase on July 23, 1917, and the subsequent and final rejection of this application by the Commissioner of the

General Land Office and Secretary of the Interior on June 23, 1922. The appellee made no claim except under the Leasing Act of February 25, 1920, and the lease granted thereunder on September 12, 1922. The appellant made no claim whatsoever under the Leasing Act, either to the lease nor to the coal contained therein, or any part thereof, but asserted his right to a patent for the land and the coal contained therein under the pre-existing coal land law.

The case of *Proctor v. Painter et al.*, 15 F. (2d) 974, same case below in 300 Fed. 476, is similar in facts to the case of *Wilson v. Elk Coal Co.* supra (see statement of facts by District Judge Neterer in 300 Federal, 476). The Elk Coal Company was the principal defendant in the Proctor case. In that case the plaintiff Proctor filed his coal declaratory statement for the NE $\frac{1}{4}$ of Sec. 34, Township 42 N., Range 7 E. W. M., and on May 14, 1919, the Department of the Interior denied his application to purchase. On March 24, 1920, the appellee Painter received a patent from the United States for the south half of the quarter section in question and other lands, under the Act of June 22, 1910 (36 Stat. 583), which provides that unreserved public lands in the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, and that patent therefor shall contain a reservation in the United States of all coal in the lands so patented, together with the rights to prospecting for, mining and removing the same. The patent to Painter contained no such reservation. On August 22, 1922, the United States leased to the appellee the Elk Coal Co. 600 acres in Section 34, including the entire quarter section claimed by the appellant Proctor. That suit was commenced on August 9, 1923, and on February 20, 1924, the appellee Painter quit-claimed to the United States all coal underlying his homestead claim, together with the right to prospect for, mine and remove the same, in accordance with the Act of June 22, 1910. The object of the suit was

to declare Painter trustee of the lands patented to him, or at least the South half of the Northeast quarter of Section 34, claimed by the appellant, under his coal declaratory statement, and to enjoin the Elk Coal Co. from entering upon the Northeast quarter of Section 34 under its coal lease, or otherwise interfering with the rights of the appellant in or to the entire quarter section.

It will be seen that the appellant Proctor claimed the title to the quarter section under an adverse, independent and hostile claim of right under his declaratory statement of March 27, 1917, which was finally denied by the Interior Department on May 14, 1919. The appellee Painter under his patent claimed the right to the surface only of the South half of the quarter section in question. The appellee the Elk Coal Company, under its coal lease issued to it under the Leasing Act of February 25, 1920, claimed the ownership of the coal and the right to mine and remove the same, from the entire quarter section, under the covenants of its coal lease.

It is thus obvious that the cases of *Wilson v. Elk Coal Company*, and *Proctor v. Painter and Elk Coal Company*, were contests between adverse claimants having claims under separate and distinct locations and appropriations, under different laws, and that the claims of *Wilson* and *Proctor* were in every way hostile, independent of, and adverse to the claim of the Elk Coal Company under the Leasing Act of February 25, 1920, and the surface homestead right claimed by Painter. Their prayers for relief were for "a decree reserving said coal deposits to himself," that the appellees be declared to hold the land and the coal contained therein in trust for the appellants, or, in the alternative, that the coal leases be canceled. The appellants *Wilson* and *Proctor* were not seeking to have the Coal Company hold the coal leases, and the estate for years secured thereby, in trust for them, either wholly or in part, but demanded a decree that would have vested in them a fee

simple title to the land and the coal, such as would have inured to them under the patent they had applied for and been denied, or that the coal leases issued to the appellant the Elk Coal Company be canceled and set aside.

By Section 7 of the Leasing Act of February 25, 1920, authorizing the leasing of coal lands, it is provided that coal "Leases shall be for indeterminate periods conditioned upon diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law, at the time of the expiration of such periods."

Act of February 25, 1920, c. 85, Sec. 7.

In deciding the Wilson case the Circuit Court of Appeals for the 9th Circuit put its decision on the following grounds:

"For the purpose of this case we may assume that the appellant had a preference right of entry and was entitled to a patent upon submitting final proof and paying the purchase price prescribed by law; but the fact remains that the title is still in the United States, and the United States is still claiming that title as against the appellant and all the world. Under such circumstances, we think it is well settled that a suit of this character will not lie. After the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before . . . We are clearly of opinion that the courts are without jurisdiction to grant relief in favor of one claiming only an equitable title as against a party in possession under a lease from the United

States, so long as the title remains in the United States . . . If the court had jurisdiction to grant the relief prayed we need not inquire whether the United States was a necessary party to the suit."

Wilson v. Elk Coal Co., 7 F. (2nd) 113.

The United States Circuit Court of Appeals for the 9th Circuit placed its decision in the Proctor case upon the following grounds:

"As will be seen from the foregoing statement, the title to the North half of the quarter section in question is still in the United States and is now in the possession of the coal company, as a lessee from the United States under the Leasing Act, so that as to that part of the tract the case is controlled by Wilson v. Elk Coal Co., 7 F. (2d) 112."

The Circuit Court of Appeals then considered the validity of the patent to Painter for his homestead, containing no reservation of the coal beneath the surface, as was required by the law, and held that such attempted conveyance of the coal by the Land Department to Painter was void and then stated:

"But whether this view is correct or not, the United States was at all times unquestionably the equitable owner of the coal underlying the land notwithstanding the unauthorized homestead patent, and if we disregard the reconveyance by the patentee entirely, such equitable ownership would of course make the United States a necessary and indispensable party to any proceeding in which it was sought to control the title to the underlying coal."

Proctor v. Painter, 15 F. (2d) 975.

Thus in the case of Proctor v. Painter et al., the Circuit Court of Appeals for the 9th Circuit decided: (1) That the title to the North half of the quarter section was still in the United States, and that the Elk Coal Co., being in pos-

session as lessee under the Leasing Act, the leased land and the coal beneath its surface is still in process of administration by the Land Department; and (2) that the equitable ownership of the coal now underlying the land was in the United States, and that such so-called equitable ownership would of itself make the United States a necessary and indispensable party to any proceeding in which it was sought to control the title to the underlying coal.

It thus seems that the Circuit Court of Appeals for the 9th Circuit has decided that coal lands leased under the Leasing Act of February 25, 1920, are in process of administration by the Land Department, and that so long as such leases are in existence, which may be in perpetuity, or in any event until otherwise provided by Congress, the right and equities of private parties who have been defeated before the Land Department of the United States, can never be inquired into by any court. This a holding that a coal lease, under the peculiar wording of the act dealing with coal lands, is a mere license, revocable at the pleasure of the Secretary of the Interior, and not a lease in any sense of the word, and that it conveys no title or estate of any character to the lessee that is impregnable to attack on the part of the Government, even though the lessee complies with all the covenants of his lease, and that the coal deposits are always in process of administration by the Land Department, that the lessee has no legal title, and no estate for years, and that the matter of the title to the land and deposits of coal is still in fieri and in perpetual process of administration by the Land Department. But the cases cited by the Court do not sustain its decision, and we have been unable to find any cases that do so.

The decision of the Circuit Court of Appeals for the 9th Circuit in the Wilson case also seems to be an authority for the proposition that: "If the court had jurisdiction to grant the relief prayed, we need not inquire whether the United States was a necessary party to the suit."

Wilson v. Elk Coal Co., 7 F. (2d) 113.

It will be observed that in both of the above discussed cases the plaintiffs were seeking to overthrow the estate in reversion held by the United States after the termination of the lease; *were seeking to cancel and set aside the coal leases* granted by the United States to the Elk Coal Company; and asking that appellants be decreed to be the owners in fee simple of the land and the coal, entirely freed of any right, claim, title, or estate of the United States and its coal lessee in the premises. Such cases, on such facts, and the objects sought to be attained by the plaintiffs through the decrees of the court, we submit, cannot in any way be authority for the proposition that the United States is an indispensable party to the action in the case at bar, or that the action of the Department of the Interior in granting an oil and gas lease to the Federal Oil Development Company is conclusive on the rights of the appellant in the instant case.

The form of the oil lease that is the subject of controversy in this action is fully set out in the Rules and Regulations adopted by the Secretary of the Interior to carry out the provisions of the Leasing Act in relation to oil and gas, omitting only the date, the name of the lessee, and the description of the leased property, and is found in the 47 Land Decisions, at pages 447 to 450 inclusive. As the form of lease is a part of the Secretary's regulations, and the regulations are a part of the law, this Court will take judicial notice of the fact that the granting clause of the oil lease under which the appellees claim in the case at bar is in the following words:

"THIS INDENTURE OF LEASE, entered into in triplicate, as of the 21st day of August, 1920, by and between the United States of America, party of the first part, hereinafter called the lessor, acting in this behalf by the Secretary of the Interior, and the Federal Oil and Development Company, a corporation of the State of Delaware, party of the second part, hereinafter called the lessee, under, pursuant,

and subject to the terms and provisions of the Act of Congress approved February 25, 1920 (Public No. 146), entitled 'An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas and Sodium on the Public Domain,' hereinafter referred to as the act, which is made a part hereof, WITNESSETH:

"Sec. 1. Purposes.—That the lessor in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and gas deposits in or under the following described tracts of land situated in the Salt Creek Field, Wyoming, and more particularly described as follows: The Southeast quarter (SE $\frac{1}{4}$) of Section Thirteen (13), Township Forty (40) North, Range Seventy-nine (79) West of the Sixth Principal Meridian, Natrona County, Wyoming, containing one hundred sixty (160) acres of land, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of twenty (20) years, with the preferential right in the lessee to renew this lease for successive periods of ten (10) years upon such reasonable terms and conditions as may be prescribed by the lessor unless otherwise prescribed by law at the time of expiration of such periods."

The above quoted granting clause of the oil lease issued to the Federal Oil and Development Company, involved in this action, shows conclusively that an oil lease is a *grant* for twenty years, or so long as the covenants of the lease shall be complied with, of the land and all the oil deposits contained in the leased lands, without any reservation, restriction, or exception whatsoever, that in any way qualifies or limits the definite estate for years created by this

lease. And, as if to make assurance doubly sure that the oil lease involved in this action grants a definite estate for years, with the preferential right of renewal for successive periods of ten years after the expiration of the twenty-year term, and a vested freehold interest, Section 7 of the lease states that: "It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto."

Then follow certain covenants to be performed by the lessee, none of which have been broken and therefore do not detract in any way from the "*grant and lease* to the lessee of the described premises and the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and gas deposits in or under the described tract of land for a period of twenty years." Section 3 of the lease contains certain reservations, which do not impinge in any manner upon the definite estate for years in the land and in the oil and gas contained in the described premises, and the unrestricted right to extract, remove and dispose of the same under the oil lease. The reservations in the lease as to easements, rights of way, and disposition of the surface of the land not necessary for the use of the lessee, are as follows:

"Sec. 3. The lessor expressly reserves:

(a) *Rights reserved—Easements and rights of way.*—The right to permit for joint or several use such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in said act, and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) *Disposition of surface.*—The right to sell or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted in so far as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein."

These reservations do not in any manner detract from the estate for years in the described premises and in the oil and gas contained therein granted and conveyed by the oil and gas lease, which grants to the lessee the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and gas deposits in or under the described premises. The reservation of the right to lease, sell or otherwise dispose of the surface of the lands embraced in the oil and gas lease not necessary for the use of the lessee in the extraction and removal of the oil and gas therein will never be exercised by the lessor, as the Interior Department has resolutely and uniformly refused to lease, sell, or otherwise dispose of the surface of any of the lands in the Salt Creek Oil Field held under oil and gas leases for any other purpose; has without exception canceled entries of surface rights made and allowed by the local land office, and even the Commissioner of the General Land Office, prior to the application for and allowance of oil and gas leases on the same lands under the Leasing Act; and has uniformly refused to even entertain any application made to enter the surface of lands held under oil and gas leases in the Salt Creek Field made since the granting of an oil lease thereon. These are all facts of public record and knowledge of which this Court will take judicial notice. And the reservation of an easement for pipe lines and rights of way, and of the surface not necessary for the use of the lessee, does not in any way impair the definite estate for years vested in the lessee by the terms of the lease.

Section 6 of the lease also throws a good deal of light upon the question as to whether the oil deposits in the lands

leased to the lessee are still in process of administration by the Interior Department. That section is as follows:

“Sec. 6. *Judicial proceedings in case of default.*—If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants and stipulations hereof, or of the general regulations promulgated and in force at the date hereof, and such default shall continue after service of written notice thereof by the lessor, then the lessor may institute appropriate judicial proceedings for the forfeiture and cancellation of this lease in accordance with the provisions of Section 31 of said act; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.”

Section 31 of the Oil Leasing Act, referred to in Section 6 of the lease, is in the following words:

“Sec. 31. That any lease issued under the provisions of this act may be forfeited and canceled by an appropriate proceeding in the United States District Court in which the property, or some part thereof, is located, whenever the lessee fails to comply with any of the provisions of this act, of the lease, or of the general regulations promulgated under this act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.”

Act of February 25, 1920, c. 85, Sec. 31.

The statutory provision found in Section 31, *supra*, that any oil lease issued under the provisions of the act may be forfeited and canceled by appropriate proceedings in the proper United States District Court, whenever the lessee

fails to comply with any of the provisions of the Leasing Act, or of the lease, taken in connection with Section 18 of the Leasing Act, under which the lease in controversy was issued, shows conclusively that the Land Department has no jurisdiction to cancel or forfeit the lease except in a proper action brought in a court of competent jurisdiction; that the lease and the oil deposits *granted and leased* thereby are not in process of administration by the Land Department of the United States; and the United States is not an indispensable party to this action; and that any court of competent jurisdiction has the right to inquire into and to adjust the equities of private parties inter se in the oil lease, arising out of their co-ownership and tenancy in common of the lease and the leased premises, having its inception in the valid mining location that was the very foundation of the title and gave the right to the oil lease issued and in controversy in this action. Had the *legal title not passed* from the United States the Interior Department would have had the right, on proper notice and adequate hearing, to institute a proceeding in the Land Department for the purpose of trying the question of forfeiture and cancellation of the lease. But the *legal title having passed* from the United States, the Land Department has no jurisdiction in the premises.

The lease granted to the Federal Oil and Development Company, which is in controversy in this action, is a lease of the entire land and premises described and the oil contained therein for the term of years specified in the lease, and its legal effect was to vest in the lessee the right to the exclusive possession of the entire surface of the land and premises necessary for the use of the lessee in the extraction and removal of the oil and gas therein, and the ownership of the oil and gas contained in the leased land, and the exclusive right to drill for, extract, remove and dispose of the same, and of the land itself described therein, during the full term of the lease, and to assure that exclusive possession by the implied covenant of quiet enjoy-

ment of the lessor to the effect that the lessee paying the rent and royalty should peaceably and quietly have, hold, and enjoy the possession of every part of the premises not specifically reserved for the term mentioned. It *vested in the lessee* an estate for years, and it *divested the lessor* of all right to the possession or control of every part of the surface of the premises necessary for the use of the lessee in the extraction and removal of the oil and gas therein and of the premises themselves, and of the oil and gas contents thereof, until the expiration of the lease, and left nothing but the reversion to the United States.

"It is obvious that in principle the right of a lessee is the same as that of the purchaser in fee."

Waskey v. Chambers, 224 U. S. 564, 565.

"The legal understanding of a lease for years is a contract for the possession of the land for a determinate period with the recompense of rent."

United States v. Gratiot, 14 Peters, 526, 538.

Raynolds v. Hanna, 55 Fed. 783, 800.

Pelton v. Minah Consol. Min. Co., 11 Mont. 283.

"A lease is a contract between the lessor and lessee, vesting in the latter a right to the possession of the land for a term of years. It becomes an estate when it takes effect in possession."

Tiedemann on Real Property, Sec. 538.

"An oil and gas lease like that of the (defendants) passes to the lessee, his heirs and assigns, a present vested right—'a freehold interest'—in the premises."

Guffey v. Smith, 237 U. S. 101.

The law implies from the use in a lease of the word "grant" or the word "lease" a covenant with the lessee for the latter's quiet enjoyment of the premises leased against the lessor and against all claiming under him.

Duncklee v. Webber, 151 Mass. 408.

Owens v. Wight, 18 Fed. 865.

This covenant of quiet enjoyment runs with the land, and the lessor is liable upon his covenant of quiet enjoyment for any interference authorized by him by his subsequent lessees with the exclusive possession of the first lessee.

Sherman v. Williams, 113 Mass. 481, 485.
Case v. Minot, 158 Mass. 577, 585.
Shelton v. Codman, 57 Mass. (3 Cush.) 318.
Baughter v. Wilkins, 16 Md. 35.

Where a tenant for years, after subletting to a third party and before the underlease has expired, surrenders to the landlord, the latter is guilty of a trespass in entering upon the sublessee.

Krider v. Ramsey, 79 N. C. 354.
Abrams v. Watson, 59 Ala. 524.
Levitzky v. Canning, 33 Cal. 299, 306, 308.

The title to the land and oil has passed from the United States for a period of twenty years; we are not making any attack on the estate in reversion of the United States; and we are not seeking to cancel the oil and gas lease. The object of this action is to have the appellees adjudged to hold an *undivided* one-eighth interest in the leased premises and the oil and gas lease thereon, and the estate for years thereby created, and in the oil contents of said leased premises, as trustees for the appellant; and that the appellant may be decreed to be a tenant in common with the appellees in said oil and gas lease, leased premises, and the estate for years therein, and of the oil and gas contained in said premises and extracted and removed therefrom, under the lease, after the payment of all rents and royalties to the United States.

Respectfully submitted,

J. M. HODGSON,
F. E. PENDELL,
Attorneys for Appellant.

FEB 21 1927

WM. R. STANBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. 106

JAMES M. HODGSON, APPELLANT,

vs.

FEDERAL OIL AND DEVELOPMENT COMPANY AND
THE MOUNTAIN AND GULF OIL COMPANY,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

MOTION TO AMEND BILL OF COMPLAINT

Electronics

Supreme Court of the United States

OCTOBER TERM, 1926

No. 166

JAMES M. HODGSON, APPELLANT,

vs.

FEDERAL OIL AND DEVELOPMENT COMPANY AND
THE MOUNTAIN AND GULF OIL COMPANY,
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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

MOTION TO AMEND BILL OF COMPLAINT

Now comes the above named appellant in this above entitled action, and moves this Honorable Court for leave to amend the bill of complaint in this action, by amending paragraph 15 of the said bill of complaint, so that the same shall read as follows:

"15. That the said George McManus died intestate on or about the 16th day of September, 1902, in the State of

South Dakota, being at the time of his death a citizen and resident of said State of South Dakota, living in the Black Hills in said State from 1898 until his death; that the said George McManus left in the State of South Dakota a small personal estate of slight value upon which no administration proceedings, general or special, were ever had in the State of South Dakota, and that no administration of the estate left by the said George McManus in the State of Wyoming was ever had, or ever applied for, by any person or corporation, and his estate has never been administered. That the said George McManus located the said O'Glase oil placer mining claim, known and described as the Southeast Quarter (SE $\frac{1}{4}$) of Section 13, Township 40 North, Range 79 West, in Natrona County, Wyoming, with seven other locators hereinbefore named, and that until his death on or about September 16, 1902, the said George McManus contributed his proportionate share of the annual labor required to be performed, and improvements made during each year after his location of the said O'Glase oil placer mining claim; that the said George McManus located the said O'Glase oil placer mining claim under the name of George McManes, and his name appears as George McManes on the discovery notice thereof posted upon said oil placer mining claim, and in the location certificate thereof filed and recorded in the office of the Register of Deeds in Carbon County, Wyoming Territory, and Natrona County, Wyoming, and also in all instruments and documents executed and filed or recorded in the offices of the County Clerk and Register of Deeds of Carbon County, Wyoming Territory, and Natrona County, Wyoming, from the date of the location of the said O'Glase oil placer mining claim on January 11, 1887, down to February 18, 1922, pertaining or referring to the interest of said George McManus in said O'Glase oil placer mining claim. That the said George McManus left surviving him as his sole heirs at law, a widow, a daughter and a grandson, who were, at the time of the death of George McManus, citizens and residents of the State of Nebraska. That the said George McManus left his said wife and family in the State of Kansas, and removed to the State of Wyoming sometime in the year 1880, and never there-

after contributed anything to their support, nor thereafter communicated with them, and that his said wife and family and grand son never heard or knew of the whereabouts of the said George McManus, from the year 1880 until some years after his death in the State of South Dakota, and during all of said time were ignorant of his occupation, doings, business affairs, and property holdings. That during all the time from January 11, 1887, down to the commencement of this action, the said widow and daughter of George McManus, deceased, have never been citizens or residents of the State of Wyoming, and during all of said time, but at different periods thereof, have been citizens of the States of Nebraska, Iowa and Kansas, and that the said grandson, was never a resident of the State of Wyoming until shortly preceding the commencement of this action. That none of the said heirs-at-law of the said George McManus ever received any information or disclosures from any person or source giving or tending to give them any notice that apprised or informed them in any manner of the existence of any estate left by George McManus in the State of Wyoming, or elsewhere, or of their rights to such estate, and particularly the said O'Glase oil placer mining claim, and never knew of his use of the name George McManes, in the location and holding of the said O'Glase oil placer mining claim, or any other business affairs, until on or about February 1, 1922, and never had any knowledge or notice, or information leading to knowledge, of the title, interest and estate of the said George McManus in any oil and placer mining claim or claims or any other property in the State of Wyoming, or elsewhere, until revealed to them as hereinafter set forth. That no location certificate, or copy thereof, deeds, letters, or other instruments of writing, or any other documents, indicating or tending to disclose the ownership or interest of the said George McManus in the O'Glase oil placer mining claim, or any other oil placer or other mining claims in the State of Wyoming, has ever come into the possession or to the knowledge of his said heirs-at-law prior to the month of February, 1922. That the said George McManus was one of the first discoverers of the Salt Creek Oil Field, and prospected said field or in its close vi-

cinity for the period of 1887 to 1898, when he removed to the Black Hills of South Dakota; that during his residence in the States of Wyoming and South Dakota, the said George McManus had engaged in no other occupation than that of a mining prospector, but had never engaged in mining and prospecting in Kansas, or prior to his going to Wyoming Territory in 1880. That none of the said heirs-at-law of George McManus, also known as George McManes, knew of his residence and oil prospecting in the State of Wyoming, and never knew of the location or existence of the said O'Glase oil placer mining claim, or that their husband, father and grandfather, George McManus, had an undivided interest therein, until informed thereof by one A. L. Redd, on or about February 1, 1922, when said information was communicated to a daughter of Octavia Green. That none of the said heirs-at-law of the said George McManus, deceased, knew of, or had any knowledge or information leading to knowledge of the right, title, interest and estate of the said George McManus in and to the said O'Glase oil placer mining claim, described as the Southeast Quarter (SE $\frac{1}{4}$) of Section 13, Township 40 North, Range 79 West, in Natrona County, Wyoming, under the mining laws of the United States, or otherwise, until long after the 25th day of August, 1920; that none of said heirs of said George McManus, deceased, had or acquired until over 17 months after the said 25th day of August, 1920, any knowledge or notice, either actual or constructive, of their right under the Act of Congress of February 25, 1920, known as the Oil Leasing Act, to apply for within six months after the approval of said Act, and to be granted an oil and gas lease on the said Southeast Quarter (SE $\frac{1}{4}$) of Section 13, Township 40 North, Range 79 West, or for an undivided one-eighth thereof under the provisions of said Act of Congress. That Appellant had no knowledge of any kind of the existence of the O'Glase oil placer mining claim, or the right, title, interest and estate of George McManus, or of his heirs, therein, or of anything connected with the title to said O'Glase oil placer mining claim, until sometime in the month of November, 1921; that appellant did not spy this title out of the record, did not thrust himself into

this title situation in any manner, as an adventurer, or otherwise, but was informed of the fact of the outstanding title of the heirs of George McManus by a lawyer of Casper, Wyoming."

That this motion is made on the ground that neither Appellant nor his counsel knew or were informed of the facts above set forth until after the entry of judgment on the demurrer in this case in the District Court of Wyoming, on December 16, 1922, and for that reason said facts were not alleged in the bill of complaint in this action.

WHEREFORE, Appellant prays that this motion to amend the bill of complaint be allowed, and that paragraph 15 of the bill of complaint be considered as amended in the record as hereinabove set forth.

Dated at Denver, Colorado, this 14th day of February, 1927.

J. M. HODGSON,
F. E. PENDELL,

Attorneys for Appellant.

AUTHORITIES IN SUPPORT OF AMENDMENT

In the case of **WIGGINS FERRY CO. v. OHIO & M. R. CO.**, 142 U. S. 396, 415, this Court stated the rule on amendments in this Court to be as follows:

“Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one’s rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the Appellate Court to permit such amendments to be made.”

WIGGINS FERRY CO. v. OHIO & M. R. CO., 142 U. S. 415;

LIVERPOOL & G. W. STEAM CO. v. PHENIX INS. CO., 129 U. S. 397, 446, 447;

JONES v. MEEHAN, 175 U. S. 1, 29.

NOTICE OF MOTION

TO THE FEDERAL OIL AND DEVELOPMENT COMPANY and THE MOUNTAIN AND GULF OIL COMPANY, and to TYSON S. DINES, PETER H. HOLME, HAROLD D. ROBERTS, and J. CHURCHILL OWEN, THEIR SOLICITORS:

You, and each of you, will please take notice that the Appellant in the above entitled cause will move the Supreme Court of the United States, at Washington, D. C., on February 21, 1927, at the incoming of Court on said day, or as soon thereafter as counsel can be heard, for leave to amend the bill of complaint in this action in the manner and form as set forth in the foregoing motion.

Dated at Denver, Colorado, this 14th day of February, 1927.

J. M. HODGSON,
F. E. PENDELL,

Attorneys for Appellant.

Personal service, by copy, of the foregoing motion, proposed amendment to bill of complaint, and notice of motion, is hereby admitted at Denver, Colorado, this 17th day of February, 1927.

Solicitors for Appellees.

4
Supreme Court, U. S.
FILED

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Supreme Court of the United States

October Term, 1926

No. 166

JAMES M. HODGSON, Appellant,

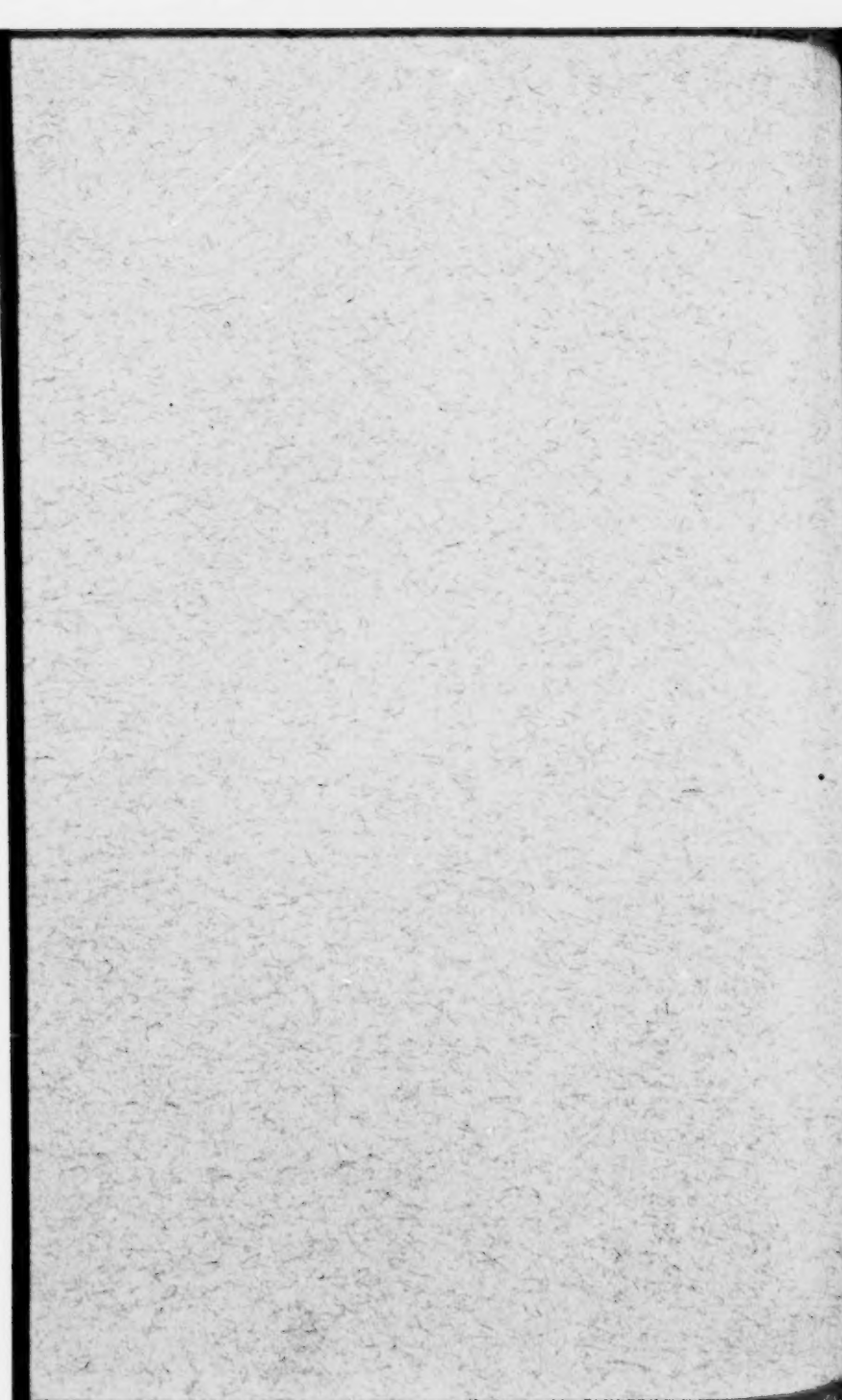
VS.

**FEDERAL OIL AND DEVELOPMENT COMPANY
AND THE MOUNTAIN AND GULF OIL
COMPANY, Appellees.**

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

BRIEF OF APPELLEES.

**TYSON S. DINES,
PETER H. HOLME,
HAROLD D. ROBERTS,
J. CHURCHILL OWEN,**
Solicitors for Appellees.



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Supreme Court of the United States

October Term, 1926

No. 166

JAMES M. HODGSON, Appellant,

vs.

**FEDERAL OIL AND DEVELOPMENT COMPANY
AND THE MOUNTAIN AND GULF OIL
COMPANY, Appellees.**

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

BRIEF OF APPELLEES.

STATEMENT.

This matter originated as a suit in equity, brought by the appellant as plaintiff in the District Court of the United States for the District of Wyoming. The purpose was to obtain for plaintiff a one-eighth interest in a certain government oil and gas lease held and operated by the defendants, covering a quarter section of valuable oil land in the Salt Creek oil field in Wyoming. The form of relief prayed for was the imposition of a trust, to the extent of this fraction, in favor of plaintiff.

The trial court sustained a Motion to Dismiss the bill of complaint. Plaintiff made no effort to amend but appealed to the Circuit Court of Appeals for the Eighth Circuit. That court affirmed the action of the trial court. From that decree plaintiff appeals to this Court.

The pertinent facts pleaded in the bill of complaint are not extensive. In order that they may stand out clearly, freed from a mass of insignificant detail and uncolored by erroneous inferences, we restate them here.

Plaintiff traces his claim to a fractional interest in the land through a recent purchase from the heirs of an early placer locator, named George McManus. The two defendants hold the government oil and gas lease, regularly issued on April 1, 1921, under Section 18 of the Leasing Act of February 25, 1920, by the Secretary of the Interior to one of them—The Federal Oil and Development Company—hereafter called the Federal Company. The other defendant takes by later partial assignment, assented to by the Secretary of the Interior (R. fol. 22). Since issuance of the lease, defendants have been producing oil from the lands covered by it at the rate of more than 1,200 barrels per day (R. fol. 24), upon which they are paying the United States royalties of from one-eighth to one-fourth of the gross production (R. fol. 13).

The lease was applied for by the Federal Company on August 21, 1920, within the six months period fixed by the Leasing Act for relief applications. In connection with its application for a lease, the Federal Company relinquished to the United States whatever title to the same land might be represented by an old unpatented placer mining claim, located in January, 1887, in the names of eight people including George McManus. The validity of this old placer claim had previously been challenged by the General Land Office,

but no decision rendered (R. fol. 20). The Federal Company claimed to own 100% of this placer title, asserting in its application that it had acquired the titles of all eight of the original placer locators, including that of McManus (R. fol. 11). In support of its claim to complete ownership, it filed in the Land Office a complete certified abstract of title (R. fol. 15) and also averred in its application that it and its predecessor in interest (Joseph H. Lobell) had claimed and possessed the placer claim continuously since prior to July 3, 1910 (R. fol. 11).

Neither the plaintiff nor the heirs of McManus adverse this application or filed any rival application for a lease or a patent for the land, although a notice of the Federal Company's application, calling upon all others having rights or claims in conflict to assert them, was duly published by the Register of the land office in a local newspaper and posted in the land office, all in accordance with the procedure outlined in Regulation No. 27, promulgated under the Leasing Act.

After the period for adverse applications had expired, and after the Interior Department had examined to its satisfaction the facts upon which the application was based, the Commissioner of the General Land Office approved the issuance of a lease to the Federal Company. This was confirmed by the Secretary of the Interior and the lease actually issued April 1, 1921 (R. fol. 13). The bill of complaint discloses (R. fol. 13) that a written letter or decision (unpublished) in respect to the issuance of this lease was handed down by the Commissioner of the General Land Office and approved by the Secretary of the Interior. The plaintiff has seen fit, however, to quote in his bill only certain fragments of this decision, introducing them by the averment that the Commissioner and the Secretary "*inter alia* found

as follows:'. What additional matters of fact may also have been found supporting the application and title of the Federal Company, or affecting the McManus title claim are not disclosed, but are left to be inferred from the fact that the Department, after being convinced of the propriety of so doing, issued the lease.

From the portions of the Secretary's findings of fact quoted in the bill (R. fols. 13-15) and from the direct averments of the plaintiff (R. fols. 15-20), an outline of the title history of this McManus fraction may be worked out. It is important that the title history of this interest be kept in mind, because the foundation of plaintiff's entire case is the contention that the fractional interest of McManus in this old placer claim never passed out of him until it descended to his heirs upon his death, and that it has now been purchased by the plaintiff.

Prior to the making of the location, all of the eight locators, including McManus, executed so-called "powers-of-attorney" to Cy Iba. An excerpt from one of these documents appears in the bill of complaint (R. fol. 14). It authorized Cy Iba to locate, stake and record claims

"the same as if we did it ourselves, and if located, or when, or after locating same to appropriate same to his sole and personal use, together with all right, title and interest in same, we hereby *granting and conveying same to him* as our grantee for a valuable consideration." (Italics ours.)

The particular one of these "powers-of-attorney" executed by McManus is alleged to have been dated March 11, 1884, and to have run in favor of Cy Iba and Shepherd Fales. The plaintiff has refrained from pleading *in haec verba* any part of the particular "power" signed by McManus; he discloses that it was similar to the one from which the above excerpt is taken and pleads the

legal conclusion that by it Iba and Fales became *joint* agents and that neither could act without the other, but the facts upon which this conclusion is based are not pleaded, nor does he negative the inference that in the event of Fales' death, Iba could act alone as sole survivor, or that Fales had power to substitute Iba, nor does he state when Fales died, or what steps if any he took to substitute Iba.

Plaintiff alleges that the claim was located, in the usual form under the mining laws, on January 11, 1887. It is averred that a discovery of oil was made, but as it is public history that the first well ever drilled to a producing sand in the entire Salt Creek field was the "Dutch Well", drilled in October, 1908, this Court will judicially notice that whatever was relied upon as a discovery in or about 1887 must have been some superficial trace or indication of oil. The Interior Department clearly found the fact to be that this location was made by Cy Iba as agent of the group. It refers to the eight locators collectively as "Iba Locators" (R. fols. 13-14) and otherwise indicates that Cy Iba did the active work. In his brief plaintiff insists that the eight locators did the locating work personally as a group. In this respect we believe the findings of fact of the Department disclosed in the bill must control.

On February 18, 1890, Cy Iba, expressly purporting to act as attorney in fact for all the eight locators, gave a deed for an undivided one-half of the entire claim to Victoria A. D. Johnson. It is explicitly averred in the bill (R. fols. 14 and 18) and found as a fact by the Department that McManus was one of the grantors named by Cy Iba in this deed as one of the principals for whom he was acting. There is, therefore, no uncertainty at all as to whether the McManus share in the claim was among the shares over which Cy Iba by this

deed asserted a power to act and purported to grant in part by this deed. This deed was duly placed of record April 4, 1895. McManus was alive for over eleven years after this deed was given and for more than six years after it was recorded. There is no averment that he ever objected to the deed or questioned its sufficiency.

On April 12, 1905, Cy Iba gave a deed for another undivided half of the claim to Joseph H. Lobell, which was recorded two days later. In this deed Iba did not describe himself as attorney in fact, or name any principals. He assumed to grant in his own name as grantor (R. fols. 14 and 18). In this connection we refer to the excerpt from the "power-of-attorney" quoted above, which shows that these documents contained words of present grant of legal title from the principals to the agent.

On February 16, 1907, Victoria A. D. Johnson conveyed her one-half interest in the claim to Frederick J. Lobell, who in turn deeded it to Joseph H. Lobell a few days later. The title to the entire claim thus came into the hands of Joseph H. Lobell and on August 26, 1915, he deeded the whole claim to the Federal Company (R. fols. 14 and 20), which in turn on August 21, 1920, relinquished it to the government and received a lease. All these deeds were recorded in due course and appeared in the abstract of title submitted to the Department.

We have analyzed these conveyances in some detail, because it is the essence of plaintiff's whole contention that because it does not appear that Shepherd Fales signed with Iba the deed of 1890 to Victoria A. D. Johnson, or the deed of 1905 to Lobell, the deeds were legally insufficient and left the McManus interest at large to descend to the McManus heirs and to be purchased in 1922 by this plaintiff after the government had leased the land to the defendants.

It is alleged that McManus died intestate September 16, 1901, leaving three named heirs, none of whom lived in Wyoming. It is not claimed that any of these heirs were infants or under any other disability. Whether McManus lived with those who became his heirs at the time of his death, or continued to live in Wyoming, is not disclosed by the bill. The statement on page 289 of plaintiff's brief that McManus died in a state other than that in which his heirs resided is totally unsupported by any averment in the bill.

Upon the question of who has been in possession of the claim through all these years, and performed annual assessment work upon it, the allegations of the bill require some analysis and may involve some internal contradictions.

It is conceded by the plaintiff that at least since April 1, 1921, the Federal Company and its co-defendant have been in exclusive possession of the land, actively producing and marketing oil therefrom (R. fols. 23, 24). The fragment from the lease application, dated August 21, 1920, quoted in the bill (R. fol. 11) shows that the Federal Company there alleged that

“said claim has been claimed and possessed continuously since prior to July 3, 1910, by this claimant (The Federal Company) and its predecessors in interest (Joseph Lobell) and is now claimed and possessed by it.”

In order to obtain a lease under Section 18 of the Leasing Act, it was necessary for the applicant to relinquish “all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to” the land applied for. The same section of the statute contains as a further condition of granting a lease, “the claimant or his successor,

if in possession of such land, undisputed by any other claimant prior to July 1, 1919 shall be entitled to a lease''.

The plaintiff has refrained from quoting in his bill any findings of the Commissioner of the General Land Office and the Secretary in respect to this essential matter, but from the fact that the Department granted a lease under this section of the Act to the Federal Company, it is obvious that the Department found that the requisite possession since prior to July 3, 1910, and absence of dispute by any rival claimant since prior to July 1, 1919, had been proved, and in any collateral controversy such as this, plaintiff will not be permitted to review or challenge the weight or sufficiency of the evidence upon which the Department so found.

In respect to the period prior to July 3, 1910, there is an averment in the bill (R. fol. 6) that "McManus * * * and his co-locators and co-owners, were and continued to be in the actual, open, exclusive, and uninterrupted possession, without any adverse claim being made thereto * * * working the same continuously, for ten successive years * * * from the said 11th day of January (1887) down to and including January, 1897, and that said possession and working continued down to and including * * * September 27, 1909."

It will be noted that this averment does not say what if any part of the possessing and working was done by McManus or by his heirs, but his name is merely bracketed with the phrase "his co-locators and co-owners". The whole theory of plaintiff's brief is that the defendants and their predecessors, the Lobells and Johnson and Cy Iba were and are "co-owners" with McManus, so that this allegation is perfectly consistent with the actual performance of all acts of possession and working during the period referred to by the

Lobells and Johnson and Cy Iba. This interpretation of the averment is strengthened by the fact that during the last eight years of the period named, McManus was dead and his heirs are alleged to have been ignorant of the existence of the claim. The pleader makes no distinction between the part of the period preceding the death of McManus and that following it during which latter time all actual acts of occupation and work must have been done by others than McManus.

Another averment of the bill which may have some bearing on possession is (R. fol. 5), "That the said George McManus, and his co-locators and co-owners have complied with all the requirements of the laws * * * by performing or causing to be performed thereon not less than one hundred dollars worth of labor, or improvements made, during each year since the year 1887, down to and including the year 1920". Here again no part or share in this work is ascribed to McManus, and since the defendants are claimed by the plaintiff's brief to have been at all times "co-owners" with McManus, the allegation is consistent with performance of all assessment work by the defendants and their grantors. Here again there is no distinction in the averment between the 14 years of this time in which McManus was alive, and the 19 years following his death during which his heirs are said not to have known of the claim.

In no part of the bill is there any basis whatever for the assertion on page 47 of plaintiff's brief to the effect that up to the time of his death McManus performed or contributed his share of the assessment work.

One more group of averments remains to be summarized. These relate to the excuses of plaintiff and the heirs of McManus for not adversing the Federal Company's application for lease and for not asserting

their claims more promptly. These averments are (R. fol. 8, 9) that the McManus heirs lived in Nebraska and Iowa, and (except one of them recently) never were in Wyoming; that none of them had knowledge or information leading to knowledge of the interest of McManus in the claim, and that none of the heirs had any actual knowledge of such privileges as may have been extended to them by the Leasing Act. In connection with these averments it should be kept in mind that the trial court judicially recognized the plaintiff as a member of the Wyoming bar, that there are no averments as to how long *plaintiff* has known of the supposed title claims of the McManus heirs, or known of the alleged title defects out of which they arise, nor does the plaintiff state how he came to find these title claims, how he came to buy them almost a year after the lease had been issued to the defendants, or what consideration he paid for this alleged one-eighth interest in a tract of land which he estimates is now worth two million four hundred thousand dollars (R. fol. 24).

Upon the basis of the foregoing allegations and disclosures of fact the plaintiff claims to be entitled in equity to an undivided one-eighth interest in the government lease held by the defendants, and asks that a constructive trust be imposed as the appropriate remedial machinery. He advances three theories in support of this claimed right: (a) That a fiduciary relationship of co-tenancy existed between the Federal Company and the McManus heirs of such nature as to obligate the defendants to turn over to the plaintiff one-eighth of the government lease they have acquired; (b) that a right to receive a one-eighth interest has been conferred upon him by statute in that section 18 of the Leasing Act provides that "all leases hereunder shall inure to the benefit of the claimant, and all persons claiming through or under him by lease, contract, or otherwise, as their interest may appear"; and

(c) that the Secretary of the Interior committed a pure mistake of law in awarding the entire lease to the Federal Company.

In opposition to these theories of recovery, the defendants filed motions to dismiss upon the following grounds: (1) That the United States is indispensable as a party defendant before the relief sought can be granted, in that it is a party to the lease and has provided by statute and by covenant therein that no lease shall be assigned or sublet except with the consent of the Secretary; (2) That it appears on the face of the bill that any cause of action is barred by the ten year statute of limitations of Wyoming, by the inexcusable laches of the plaintiff and his predecessors, and by provisions of the Leasing Act which serve as a special statute of limitations or as a statutory measure of laches; (3) That the award of the government lease to the Federal Company is a final adjudication of the right of the lessee to receive it which cannot be collaterally attacked in this proceeding; and (4) That the bill fails to state facts sufficient to constitute a cause of action in equity.

The trial court and a majority of the Circuit Court of Appeals for the Eighth Circuit have sustained the motion to dismiss. We believe this result should be affirmed.

In this brief we shall first discuss the effect of the absence of the United States as a party, then consider the failure of the bill to plead a cause of action under each of the three theories of recovery relied upon by plaintiff, and then present the defenses of limitations and laches disclosed upon the face of the bill. The effect of final adjudication by the Interior Department will be discussed in connection with the failure of the bill to present a cause of action.

BRIEF OF THE ARGUMENT.

I.

THE UNITED STATES IS INDISPENSABLE AS A PARTY DEFENDANT.

This question concerns the jurisdiction of the Court to proceed with the case, and hence arises *in limine*.

There can be no question as to the definition in general terms of who is an indispensable party. The definition adopted by plaintiff at page 182 of his brief is quoted from a decision of this Court. It reads:

“An ‘indispensable party’ is one who has such an interest in the subject matter of the controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interest or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.”

We believe the United States occupies exactly this relationship to this controversy.

The prayer of plaintiff's bill presents two alternatives: (1) Primarily it asks that the defendants be compelled to assign an undivided one-eighth interest in the lease itself to the plaintiff; (2) As a secondary alternative it prays that the defendants be ordered to account to the plaintiff for one-eighth of the net profits realized from operations under the lease after deducting royalties paid the United States and actual costs of operation.

To award relief in accordance with the first request of the prayer, in the absence of the United States as a party defendant, would be to invade a proprietary interest of the United States as lessor which has been reserved to it both by the Leasing Act and by covenants

of the lease. Section 30 of the Leasing Act expressly forbids any such relief; it reads:

“That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior.”

It is disclosed upon the face of the bill (R. fol. 13) that this statutory provision has been embodied in substantially the statutory language as a covenant in the particular lease under which the defendants hold.

To this point the plaintiff advances the contention that any assignment of a fractional interest in this lease resulting from court decree would be an involuntary assignment and that under the doctrine announced in *Gazlay v. Williams*, 210 U. S. 41, this would not constitute a breach of the covenant of the lease against assignment. In the *Gazlay* case a particular form of covenant against assignment between private parties was under consideration. It expressly prohibited “execution” sales, but was held by the court not to have been so drawn as to prohibit the passage of the lease title to a bankruptcy trustee or a sale by the trustee for the benefit of creditors. The court concedes that if the covenant had been drawn so as to show a clear intent to prohibit transfers of the type under consideration, the covenant would have been strictly enforced in spite of the involuntary nature of a bankruptcy transfer. The analogy does not exist. A legislative policy announced in the Leasing Act itself stands on a higher footing than a mere agreement between private parties interpreted *after* the happening of death or bankruptcy or some other truly involuntary matter. Here the covenant is different in form from the one in the *Gazlay* case and the Court has the opportunity to look into the propriety of a decree before any decree is given. It will not do to decree an assignment first and then justify it by calling it involuntary.

Plaintiff cites the case of *Work v. Louisiana*, 269 U. S. 250, as having some special pertinency to the matter at bar. We fail to see any resemblance. In that case there was no lease of any character involved and no attempt to deal with the title to land or any interest therein. The decision merely required the Secretary of the Interior to accord a hearing on the merits without exacting certain unauthorized conditions precedent to such a hearing.

The other cases cited by plaintiff under this general heading require no separate treatment. Whatever the nature of the legal estate created by the execution of a lease, it is perfectly clear that under the Leasing Act the United States continues to hold the general title to the land; that it has stipulated for a current continuing interest in the form of royalties, and has seen fit by covenants of the lease and by regulations to reserve an active voice in many of the details of operation, not the least important of which is the person who is to operate the lease. In the absence of the United States as a party defendant, it is in nowise appropriate for a court to tamper with the relationship so created.

In his presentation of this entire point (Plaintiff's Brief, pages 179 to 187) plaintiff repeats in full and relies chiefly upon the line of reasoning expressed in the dissenting opinion of Judge Stone announced in this case in the Circuit Court of Appeals. But as we interpret the part quoted by plaintiff from this dissenting opinion, Judge Stone concedes that the primary relief prayed for (assignment of a fraction) could not properly be awarded in the absence of the United States. He says that by the Leasing Act Congress has shown a legislative concern in the control of these leases by the Department after they are issued, and in the safeguarding of operations under them, and that a lease of this character would in its very nature be indivisible and unassignable in un-

divided parts. It is only by turning to the alternative form of relief, namely, a decree compelling an accounting for a share of net profits, that Judge Stone attempts to justify the absence of the United States in this suit.

When we turn to this alternative form of relief, we believe that the second branch of the rule concerning indispensable parties is violated. Any decree compelling the defendants to account for a share of the net proceeds of operation would be inconsistent with equity and good conscience. It would penalize the defendants beyond anything that plaintiff could be entitled to require of them. This phase of the rule is not adequately discussed in Judge Stone's dissenting opinion.

Upon this point it must be kept in mind that the defendants are bound by covenants of the lease to operate and develop the property up to the standards enforced by the rules and regulations of the Interior Department. They have given their bond to the United States to secure the performance of this and other covenants. The operation of an oil lease, even upon supposedly proved land, involves risks of some magnitude. Each new well is a speculation, and any well negligently drilled may open large areas to serious loss from water encroachment. The defendants cannot in equity and good conscience be required to carry this entire risk and account to the plaintiff for a share of profits. The defendants, however, cannot be relieved of any part of this risk unless the United States, to which their bond and covenants have been given, shall be a party to the litigation and ordered to modify the existing lease. The plaintiff claims to be a co-owner and to be entitled to a parity of position with the defendants. Even if he were entitled to this, it would not be fair to the defendants to have the plaintiff placed in a preferred position at their expense, and freed of risks of operation of which the defendants cannot be relieved.

So long as the United States is not present in court to be bound by a decree it is impossible to award any relief to plaintiff without imposing a serious inequity upon the defendants. The suit should therefore abate.

II.

NO FIDUCIARY RELATIONSHIP, ARISING OUT OF CO-TENANCY OR OTHERWISE, HAS EVER SUBSISTED BETWEEN THE PLAINTIFF OR THE McMANUS HEIRS ON THE ONE HAND, AND EITHER OF THE DEFENDANTS ON THE OTHER.

Plaintiff devotes a considerable section of his brief (pp. 57 to 135) to an elaborate development of the theory that under common law principles of co-tenancy the defendants are in a fiduciary position, equitably bound to recognize plaintiff as owning a one-eighth interest in the government lease issued to the Federal Company. The line of reasoning advanced is, that the government lease is a mere outgrowth of or substitute for a possessory placer mining title covering the same land which preceded it; that McManus owned a one-eighth of that placer mining title which descended to his heirs and passed by purchase to this plaintiff; and that an equitable obligation to share the lease with plaintiff arises out of the alleged fact that at one time the McManus heirs and the Federal Company shared the legal title to the placer location as tenants in common. In support of this line of reasoning plaintiff discusses at length the case of *Turner v. Sawyer*, 150 U. S. 578, and a large number of other cases in State and Federal Courts which have followed it.

This line of reasoning breaks down in at least two essential places. (1) The government lease is not a mere outgrowth of the placer location, and (2) whatever relationship ever existed between the McManus heirs and the Federal Company, it was never fiduciary

in any respect. We shall consider these points in the order named.

The Leasing Act marks a radical change in our legislative policy respecting the disposal and development of the parts of the public domain containing petroleum or other specified minerals. In respect to these the old mining law was repealed (except only for a saving clause relating to certain valid unpatented claims) and a new policy, of continuing government ownership with private operation on shares, was put into effect. The old mining law was a system for the selection of purchasers who were permitted to buy in fee parts of the public domain at a fixed price of \$2.50 or \$5.00 per acre as the case might be. Upon delivery of a patent, the proprietary interest of the government ceased. The Leasing Act on the other hand, contemplates the perpetual ownership of the petroleum bearing parts of the public domain by the government, coupled with the selection of eligible and competent lessees who for limited terms shall be permitted to produce oil and gas (under elaborate covenants and regulations safeguarding and conserving the deposits) with the obligation of paying a minimum rental to the government of \$1.00 per acre per year and a royalty of not less than one-eighth of the oil and gas produced. The bill discloses that the particular lease held by the Federal Company has a sliding scale of royalties ranging from one-eighth to one-fourth depending upon the average productivity of the wells obtained upon it.

Most of the Leasing Act is devoted to the selection of lessees to operate the parts of the public domain which may be found in the future to contain petroleum. With these we are not here concerned. Sections 17 and 18 cover the selection of lessees to operate the lands already known at the date of passage of the Act to contain oil. Section 17 commands the Secretary to lease to qualified operators upon competitive bidding all such

known petroleum lands as are not already appropriated or subject to preferential lease. Then Section 18 (under which the Federal Company lease was issued) covers the whole class of preferential leases. The part of this Section containing all of the requisites of preference reads:

"Sec. 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this act, of all right, title and interest claimed and possessed prior to July 2, 1919, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells so discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States."

A reference to a location under the pre-existing placer law will be observed in the part quoted, but it will also be observed that the preference claimant is not required to show ownership of a complete or valid title to one. He is not required to have marked the boundaries of any claim upon the ground, to have done \$500.00 worth of work for the improvement of the claim or to be the owner of a complete or valid placer title in any respect. In fact it is well known that one of the primary purposes of the Section was to give limited relief to those

whose only vestige of claim to the land was under a placer location made *after* September 27, 1909, upon withdrawn land (hence totally invalid under the decision of this Court in *United States v. Midwest Oil Company*, 236 U. S. 439) but *before* July 3, 1910, when the act withdrawn, this time expressly authorized by Congress, became effective.

Certain new requirements, however, totally unknown to the old placer law are laid down. These are: (a) to file a relinquishment to the United States within a specified six month period, February 25 to August 25, 1920, of whatever claim the applicant might have under the placer law—the only requisites of this title being that it must have had its inception prior to July 3, 1910, and that it must have been claimed and possessed continuously since by the claimant and his predecessors; (b) to have drilled one or more oil or gas wells upon the land; (c) to pay one-eighth of the value of past production as royalty to the United States—this was a settlement for past trespasses on the land under invalid title; and (d) to have been in possession of the land undisputed by any other claimant at least as early as July 1, 1910.

The administration of the Leasing Act is confided to the Secretary of the Interior, who is expressly given full power by Section 32, to prescribe all necessary rules and regulations to carry out the Act. By a clause of Section 18 it is provided:

"In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just."

The details of procedure are not set out in the Act itself but are found in the regulations promulgated by the Secretary. These require among other things, that the applicant file a certified abstract of title brought clear

down to date covering the land (Regulation 25 (d) Appendix p. 92); that the applicant post in the local Land Office and have the Register publish for thirty days in a newspaper published in the vicinity of the land most likely to reach the general public, a notice describing the land applied for, giving the name of the applicant, and advising all persons having adverse or conflicting claims, whether under the Mining Act or under any other public land law, to appear and present their claims (Regulation 27, Appendix p. 93). There is an express prohibition to any person claiming only a fractional or undivided interest in a piece of land to apply for what he claims without joining his co-owners (Regulation 24 1/2, Appendix p. 92). And a procedure for hearing conflicts with a right of appeal from the Commissioner of the General Land Office to the Secretary of the Interior is set out in some detail (Regulation 28, Appendix p. 94).

The bill of complaint in this suit discloses that the lease held by defendants was issued to the Federal Company under this Section 18 of the Act. Compliance by the Federal Company with some of these requirements of the Act and of the regulations is expressly pleaded in the bill, but whether pleaded or not the fact that a lease has issued carries with it a presumption of compliance with all the conditions precedent.

Now in view of the terms of the Act can it be said that this lease is a mere outgrowth or ripening of the old placer location in which McMinus was a locator, in anything like the sense that a placer patent is a mere perfecting of the placer location upon which it is based? We think it cannot. Whatever interest the Federal Company had in the old placer location it relinquished to the United States. For the purposes of the Mining Act an imperfect invalid location title was just as good as any other. The real tests which the Federal Company had to meet were: (a) that it and its predecessors claimed and

possessed the claim relinquished continuously since July 3, 1910, (b) had it drilled a well on the land, (c) was it ready and able to pay the United States one-eighth of the value of past production, and (d) was its possession of the land since at least as early as July 1, 1919, undisputed by any other claimant. McManus and his heirs and this plaintiff contributed nothing which the Federal Company needed in order to meet these conditions, and there is nothing in the allegations of the bill to show that the heirs of McManus or this plaintiff could have met these tests. In saying this we do not overlook the consistent plea of plaintiff that a fiduciary relationship existed and that every act of the Federal Company was the act of the McManus heirs. We shall deal with this fiduciary theory a little later and show that the relationship between them was hostile from its inception and never fiduciary.

When we compare some phases of the procedure connected with the granting of a lease under Section 18 of the Leasing Act with the corresponding procedural steps connected with the issuance of a mineral patent, the distinction is emphasized. The mineral patent is sometimes said to relate back to the date of location; the issuance of the patent clears the title only of external adverse claims and is held not to adjudicate internal conflicts. In contrast with this a government lease is something new. The possibility of becoming lessors under the government was never contemplated by the claimants of these lands until the new legislation took form. The award of a lease to a particular applicant is an adjudication by the Secretary of the Interior, under a power expressly conferred upon him by the Leasing Act, of the absence of conflicting claims of any sort including the conflicting claims of those who claim to be co-owners.

The Federal Company expressly applied for and claimed to be entitled to this entire lease. A clause of Section 18 of the Act quoted *supra* expressly authorizes the Secretary to decide conflicting claims to leases, and authorizes him as a result of such decision to grant leases, "to *one or more* of them as shall be deemed just". This shows that the decision of what might be termed *internal conflicts* under which each claimant might be entitled to part of the land, was contemplated as well as the decision of *external adverse claims* under which one or the other claimant would prevail in toto. This interpretation is reinforced by Regulation 24½ which expressly recognizes the right of one whose claim to the land is only to an undivided fraction to make application without reference to what the owner of the remaining fraction may do.

In this respect the adjudication of right to a lease is a broader adjudication than that involved in the issuance of a patent under the mining law. *Turner v. Sawyer*, 150 U. S. 578, upon which the plaintiff places such great reliance, was decided under the mining law. It held that the statutory adjudication connected with the issuance of a mineral patent did not extend to conflicting claims to ownership of fractions of the same title, but dealt only with the external adverse claims arising between different locations of the same ground. This conclusion is based upon a strict construction of the scope of the matters to be determined in advance of the issuance of a mineral patent. The Court quotes (on page 587) from Revised Statutes, Sec. 2325 and Sec. 2326:

"If no adverse claim shall have been filed with the register and receiver of the proper Land Office at the expiration of the sixty days of publication * * * it shall be assumed that the applicant is entitled to a patent * * * and that no adverse claim exists * * *."

and

“where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making same, *and shall show the nature, boundaries, and extent of such adverse claim* * * *.” (Italics ours.)

From these statutory provisions, this Court draws its conclusion in the following language:

“In this case there was no conflict between the different locators of the same land, and no contest with regard to boundaries or extent of claim, such as seems to be contemplated in these provisions. Turner did not claim a prior location of the same lode, and made no objection to the boundaries or extent of Sawyer’s claim, but asserted that he had acquired Sawyer’s title by legal proceedings. The propriety of such claim was not a question which seems to have been contemplated in requiring the ‘adversing’ of hostile claims.”

It will thus be seen that in *Turner v. Sawyer* it is not the degree of finality of the patent that was under consideration, but rather the scope of the adjudication, pursuant to which it had been issued.

We have pointed out above that the Leasing Act contemplates that the Secretary shall decide the conflicting claims of would-be co-tenants, and directs a broader adjudication than the proceedings accompanying the issuance of mineral patents. For this reason neither *Turner v. Sawyer* nor any of the cases which follow it in this construction of the mining law is applicable to the Leasing Act.

There is a practical reason for this different rule being adopted in the Leasing Act. If the United States is to become a landlord and select a lessee to develop its

land on a royalty basis, it is only common sense for it to make its selection final and see to it that it collects royalty from the right man. If wranglings over conflicting shares in a lease are left open, to drag their way through the courts, the United States as a business matter may be seriously embarrassed. In the instant case plaintiff claims only one-eighth and has not sought to interfere by injunction with operation of the land. Suppose, however, he claimed seven-eighths; as a practical matter could such a claim be litigated without completely upsetting development during the years it might be in Court? For this very practical consideration Congress intentionally authorized the Secretary to make a final determination of all such conflicting claims before a lease should issue.

The McManus heirs were among those notified by the published notice that a lease covering all of this tract of land had been applied for by the Federal Company. Whatever claim they had was in conflict with the Federal Company's application. They let it go by default. The adjudication is none the less final, and the lease stands a new title in which they have no interest.

The second respect in which plaintiff fails to bring the facts of this case within the requirements of his "co-tenancy" theory of recovery, outlined above, is that no fiduciary relationship now exists or ever has existed between either of the defendants on the one hand and George McManus, the McManus heirs or this plaintiff on the other.

The efforts of plaintiff to establish fiduciary relationship may be summarized as follows: He alleges that because Shepherd Fales did not join in the deeds to this land executed by Cy Iba, those deeds were legally defective and failed to convey the legal title to the McManus fraction. As to certain other fractions, however, they

were effective. Hence, he says, Victoria Johnson got a smaller fraction than the deed to her called for; the Lobells in turn got smaller fractions than their deeds called for; and finally the deed from Joseph Lobell to the Federal Company in 1915 was effective to pass only a fraction of the title leaving at least a one-eighth of the legal title outstanding in the McManus heirs. Thus, he alleges, the Federal Company, in the contemplation of the law, came to share a legal title with the McManus heirs; the sharing of a legal title is co-tenancy; co-tenants occupy a relationship of trust and confidence toward each other; therefore the fiduciary relationship! From this he goes on to say that because the Federal Company has never recognized the existence of any outstanding McManus fraction; has unequivocally claimed, in its application for a lease, to have acquired the McManus fraction by purchase; and has in every way refused to recognize the McManus heirs and this plaintiff as having any interest in the present lease—because of all this, he calls the defendants “faithless”, and “overreaching”.

The trouble with this whole line of reasoning is that the mere fact that undivided fractions of the same legal title are outstanding in two different persons is not enough to create a relationship of trust or confidence between them. Co-tenancy is not always fiduciary. Even if we were to assume that the Cy Iba deeds were defective the fact of sharing a legal title in common would not necessarily create a fiduciary relationship. A fiduciary relationship arises only when by reason of the facts surrounding the inception of title and from the absence of anything to interrupt it, one tenant is justified in relying upon the other to recognize and preserve the interest of both. No fiduciary relationship arises where the entry of one tenant is avowedly hostile to, or acts as an exclusion or denial of, the title of another; and, even if a fiduciary relationship may once have existed between

tenants in common, it will cease when either of them does acts or makes declarations palpably inconsistent with its continuance.

This rule is stated very clearly by Freeman in his text on *Co-Tenancy and Partition* (Section 155).

“When Purchase of Adverse Title Permitted.
—As the rule forbidding the acquisition of adverse titles by a cotenant, from being asserted against his companions, is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint-tenants, tenants by entirety, and coparceners, always hold by and under the same title. Their union of interest and of title is so complete, that, beyond all doubt, such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the other in reference to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at differ-

ent times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises.”

In *Shelby v. Rhodes*, 105 Miss. 255, the alleged owner of a half interest in certain land sought to establish his claim by a partition suit. The defendant's predecessor in interest, had entered under an invalid deed purporting to cover the entire property. The defendant had subsequently acquired a valid, outstanding title good against both parties. In dismissing the partition proceeding, the Supreme Court of Mississippi says (p. 266):

“The rule which prevents one tenant in common from purchasing an outstanding title to the common property and setting it up against his cotenant is founded upon the confidential relation which is presumed to exist between them, and has no application where the circumstances surrounding them negative any such relation, and show that they, though in law tenants in common, are not such in fact, and are asserting hostile claims against each other with reference to the common property.

(2) Pretermittting any discussion of appellee's contention that W. L. Rhodes never became a tenant in common with appellant, for the reason that the deed to Mary E. Shelby, which appellant claims constituted the source of their common title, is not merely defective, but is void, and treating W. L. Rhodes as in law a tenant in common with appellant, since he in fact never admitted any such relation, but entered into the exclusive possession

of the whole of the common property, claiming it under a deed which conveyed to him the whole of it, and not an undivided interest therein, it can hardly be said that such a confidential relation existed between him and appellant as to make it inequitable for him to purchase the outstanding title and thus obtain what he intended to and thought he had obtained in the first instance by his purchase from W. W. Shelby, to-wit, a perfect title to the property."

In *Sands v. Davis*, 40 Mich. 14, plaintiff attempted to establish a co-tenancy. The defendant Sands set up a tax title which he had acquired subsequent to his entry.

In permitting him to defend under this tax title, the Court says (page 19):

"If Sands had gone into possession by the aid of the other tenants, or in recognition of their rights, he might in that way, perhaps, have incurred some duties toward them. But he went in as a stranger to their claims under a claim which denied their existence or validity. He became liable to an action of ejectment the moment he assumed possession. We see, therefore, no reason why he could not then or thereafter, as well as he could have done it before, purchase a title which was at that time adverse to the holders of the whole original title."

In *Joyce v. Dyer*, 189 Mass. 64, the question considered was whether adverse possession for the period of the statute of limitations had vested an unassailable title in Dyer or whether the plaintiff through a claim of co-tenancy was entitled to a fraction therein. In holding that the statute commenced to run from the very date of entry by Dyer, the Court says (p. 69):

“In considering this question we must bear in mind the familiar principle that when one enters upon land he is presumed to enter under the title which his deed purports upon its face to convey, both as respects the extent of the land and the nature of his title. The deed to Samuel Dyer purported to convey the fee in the whole. Under that deed he entered, and, in the absence of anything shown to the contrary, he is presumed to have entered under a claim of right to the fee in the whole. It is not a case where a tenant in common, being or entering into possession as such, afterwards attempts to claim that his occupation was adverse to his co-tenant. Dyer did not enter as a tenant in common. From the very first he is presumed to have claimed under his deed, and there is nothing to show that he or his successors ever acknowledged or ever supposed that the title was anything other than as it appeared upon the face of the deed.”

In *Steele v. Steele*, 220 Ill. 318, it is again a question of the statute of limitations that the Court considers, and announces the rule (p. 321):

“A sale and conveyance of the whole title to a tract of land by one co-tenant, followed by adverse possession, amounts to an ouster or disseisin of the other co-tenants, and the statute of limitations will bar their action or entry.”

The cases we have discussed on this point and many other cases to the same effect are cited with approval and applied in *Elder v. McCloskey*, 70 Fed. 529, in an opinion by Mr. Chief Justice Taft, then Circuit Judge of the Third Circuit. These cases amply sustain our contention that the Federal Company never assumed any fiduciary obligations toward the McManus heirs. Its first

contact with the title to the old placer location was a deed under which it claimed it all. Whether the interpretation it placed upon the Cy Iba deeds was correct or not, it claimed to own the entire location. It went on to assert its ownership with sufficient continuity to meet the requirements of the Leasing Act. It proved to the satisfaction of the Secretary of the Interior that its possession of the land since at least as early as July 1, 1919, had been undisputed by any other claimant. It asserted a complete ownership of the old placer location in its application for a lease in 1920. Thus at every turn it has been openly hostile to any McManus claim. The conveyances under which it held were separate and its grantors different from any under whom the McManus heirs might claim. It is impossible to spell any fiduciary obligations out of such a situation as this.

On pages 227 to 232 of his brief plaintiff tries so to analyze the allegations of his bill as to avoid the effect of the rule for which we contend. In substance he contends that his bill is ambiguous and uncertain upon the question of just what interest in the land the deed to the Federal Company in 1915 purported to cover. We believe his bill is sufficiently explicit. Among the fragments of the findings of the Secretary of the Interior quoted in the bill is this (R. fol. 14):

“On April 12, 1905, Cy Iba conveyed a one-half undivided interest in the claim to Joseph H. Lobell, and February 16, 1907, Victoria A. D. Johnson conveyed an undivided one-half interest in the claim to Frederick J. Lobell, who two days later conveyed same to Joseph H. Lobell. The title to the claim thus acquired by Joseph H. Lobell passed August 26, 1915, to the applicant.”

Then later in the bill plaintiff repeats this title history in his own words as follows (R. fol. 20):

“that the color of title thus claimed to be acquired by the said Johnson and Lobell passed on or about August 26, 1915, to the said applicant; and that the said pretended right and title of the said defendant the Federal Oil and Development Company to the said title, interest and estate of the said George McManus under the preexisting placer mining law in and to the said premises, upon which the said oil and gas lease was applied for and afterwards granted, is found and rests solely upon the said deeds hereinbefore described from the said Cy Iba to the said Victoria A. D. Johnson and Joseph H. Lobell.”

Then, further, it is alleged in the bill that the Secretary of the Interior, “found as a matter of law that the defendant the Federal Oil and Development Company was the holder of the fee title to the O’Glase oil placer mining claim” (R. fol. 21).

From all these allegations we think it is perfectly clear that the deed under which the Federal Company claimed the land purported to convey it all. For our present purposes we need not go farther back with the title. But if any ambiguity did exist in the allegations of the bill, it could not better plaintiff’s position. The burden is on plaintiff to prove that a fiduciary relation existed, not upon the defendants to establish affirmatively that it could not have existed. The bill certainly cannot be interpreted as pleading affirmatively that the Federal Company ever recognized any right in the McManus heirs.

As we have just pointed out, it is not necessary to go farther back in the title chain of the old placer location than the deed to the Federal Company in 1915 in order to determine that at the inception of its title this defendant assumed no trust obligations toward the McManus heirs. Plaintiff, however, in his brief considers in considerable detail the inter-relationship of the several parties during the period from 1907 to 1915 through part of which time Frederick Lobell and Joseph Lobell were each claiming an undivided one-half interest in this old placer title under separate deeds, one remote and the other direct, from Cy Iba. We believe that during this period, too, there had been a total repudiation of the existence of any title in the McManus heirs, and that neither of the Lobells was in the position of having recognized any fraction as outstanding in the McManus heirs. Plaintiff objects that the title at this time was divided; he cites *Noble v. Hill*, 8 Tex. Civil App. 171, and other similar cases, to the point that fractional deeds cannot be added together to make up a repudiation of title. The case he cites does not go this far, but determines only that under its particular facts there was no clear repudiation of the existence of an outstanding fraction. In that case three separate deeds from as many separate grantors to one common grantee were relied upon as an assertion of complete title by the grantee. It appeared however that the title had formerly been vested in five heirs, that one of the deeds though describing its interest as a one-fourth recited also that it covered the title of one named heir, another deed described its interest as a one-half but recited that it covered the title of two named heirs, the other deed, like the first, described a one-fourth interest but named only one heir as its source of title. The aggregate result of all three deeds was to show on their faces that they purported to cover the title claims of only four of the five heirs. Upon these facts the Court held that the mere

fact that the fractions added up to 100% was not enough to make a holding under these deeds a repudiation of any title in the fifth heir.

No such ambiguities exist in the Cy Iba deeds. Each was for a full undivided half, neither limited its source of title, each was from the same grantor, and went to a different grantee. It cannot be presumed that both deeds covered the same half of the property, and the subsequent title claim shows that they were not so construed by the grantee therein.

In view of the title history of the old placer location, disclosed on the face of plaintiff's bill, it cannot be said that at any time the Federal Company ever recognized the McManus heirs as owning a fraction therein, or in any other way ever pledged its faith to the McManus heirs, or came under any equitable obligation to protect or safeguard any such interest. It claimed to own the entire location. If it was wrong in its construction of the law, then it or its predecessors might have been liable in a possessory action brought before any statute of limitation had run, but it never became obligated in equity to protect the old placer title; much less was it bound to share with the McManus heirs the new government lease it has received, and much less still is it bound to recognize any title pretensions of this plaintiff, who thrust himself as an adventurer into this title situation almost a year after the government lease had been issued and operations commenced thereunder.

Since no fiduciary relationship ever existed between the parties to the instant case, the type of relief granted in *Turner v. Sawyer, supra*, would not be appropriate even if the title held by the defendants were a patent under the mining law instead of a new type of title issued under the Leasing Act. In *Turner v. Sawyer*, the defendant, prior to issuance of patent, had recognized the

existence of the fraction claimed by plaintiff. This appears from the fact that the defendant had published a statutory notice calling upon the plaintiff as a co-tenant to pay his share of the expense of assessment work or be barred from participation in the claim. The notice was defective; so it did not accomplish any forfeiture of plaintiff's title, but it was positive evidence of recognition of title at the outset. This fiduciary relationship was essential to the decision of the case; for, after stating the rule that a fiduciary co-tenant will be compelled to hold in trust for his co-owners, this Court goes on to state the law substantially in the words used by Freeman on *Co-tenancy and Partition* in the excerpt quoted, *supra*. The Court says (150 U. S. 586):

"A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors."

Obviously the reason for the distinction is that tenants in common of this latter class will not be deemed to have recognized each other's existence in the title. One whose faith has never been pledged to support or recognize a title cannot be deemed faithless if he refuses to do so.

Johnson v. Riddle, 240 U. S. 467, is a case of some interest upon this entire phase of this suit. There it may be seen that the existence between rival claimants of a relationship usually classed as fiduciary does not necessarily result in the imposition of a trust upon the government grant when it is issued, even though the relation existed prior to the grant. It is discussed at length in plaintiff's brief, pp. 208-213.

The intricate details in that case involving several devolutions of right on both sides may be ignored. In their essence, the facts were that a white man, having

no legal title to land, took possession of a certain building site within an Indian Reservation. He leased this site to another white man, who erected a store building thereon. Later, for the purpose of solving the problem of these white encroachments into the Indian lands, the Atoka Agreement was drafted by the Indian tribes and approved by Congress. It provided, in respect to occupied building sites, that, upon application made to a commission within sixty days after platting and survey of the lands, *the owner of the permanent improvements* thereon might purchase the land from the Indians and the government upon the basis of a specified fraction of the appraised valuation. In this instance the lessee was the owner of the improvements. He made application, and purchased under the Atoka Agreement. The lessor contended that, by virtue of the old relationship of lessor and lessee, a trust should be imposed upon the property in his favor.

In rejecting this claim and affirming a judgment for the lessee, this court holds that neither the lessor nor the lessee had any legal right upon the land prior to the granting of title under the Atoka Agreement; that up to that time each one of them was essentially a trespasser; that the lessor could not establish a trust in his favor unless he could comply with the familiar rule laid down in *Boholl v. Dilla*, 114 U. S. 47, by showing that, had the commission committed no legal error in its interpretation of the Atoka Agreement, the title would have been awarded to him.

The Court says, page 481:

“The lease created a mere estoppel between trespassers. The rights, if they may be called rights, of lessor and lessee alike, were terminated by the force of the Agreement. Individual ownership of the land originated with that instrument, and can be only such as by its terms was created.

It was competent for Congress, or for the Indian tribes, with the concurrence of Congress, to deal as they deemed proper with the practical situation resulting from the building of towns by white men within their borders. They chose to confer a preferential right of purchase, at a discount from the appraised value, not upon the 'occupant', or 'possessor', or 'landlord', or 'tenant' but upon 'the owner of the improvements' other than those of a temporary nature. This did not cut off any pertinent equity, but it rendered all equities impertinent except such as related to the ownership of the improvements."

The relationship between lessor and lessee growing out of mutual agreement is much more fiduciary in character than that between co-tenants who by accident may share a legal title.

Under this general topic in his brief plaintiff cites a very great number of cases, which cannot be discussed here without extending this brief to unreasonable limits. Many of these cases merely announce general principles of the mining law with which we are not here concerned. We do not question the fact that a valid unpatented mining location has a certain legal status. It is a possessory estate passing by grant or inheritance. Plaintiff is not correct when he says that after a location is made, the United States retains nothing but a naked legal title held in trust for the locator. That condition does not arise until the locator applies for patent and the government receives his purchase price. But all this is of no moment here; for, whatever the dignity of placer locations, it is the settled law that when the United States gets ready, under appropriate legislation, to issue a formal conveyance to any private person covering any part of the public domain, a proceeding initiated by an application for the conveyance may be had in the Gen-

eral Land Office, and the final adjudication of that office as to who shall receive the conveyance becomes conclusive and cuts off all unpatented rights whether under the placer law or any other public land law. Such an adjudication took place here in favor of the defendants, and it is conclusive.

Most of the other cases cited by plaintiff follow and repeat the rules laid down in *Turner v. Sawyer*. We have found none of them applying that rule to such a situation as the instant case presents.

III.

PLAINTIFF IS NOT ENTITLED TO RECOVER UNDER THE "INURING CLAUSE" OF THE LEASING ACT.

Section 18 of the Leasing Act contains two clauses in juxtaposition which define the respective fields of Departmental determination and Court adjudication. These clauses should be considered together. They read:

"In case of conflicting claimants for leases under this section the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear. * * *"

The latter one of these two clauses has sometimes been called the "inuring clause". Plaintiff devotes pages 136 to 151 of his brief to the contention that he is entitled to recover a one-eighth interest in the Federal Company lease under this clause. He predicates this upon the assertion that by purchase from the McManus heirs he has become the owner of a one-eighth interest in the placer mining location, which covered the land in question prior to the issuance of the lease.

According to the facts as pleaded by plaintiff, this alleged title interest first came into existence in George McManus, who, it is alleged, acquired it directly as a placer location from the United States. It certainly was never created by the defendants or even by their predecessors in interest. In spite of this, plaintiff tries to construe it as an interest claimed "*through or under*" defendants, "*by lease, contract, or otherwise*". The phrase "claiming through or under" has a perfectly definite meaning in relation to legal titles. It means a derived estate, a subordinate estate. It means that the one claiming to hold through or under must trace the origin and inception of his title back to or through the person through or under whom he claims to hold. This is obviously not the case with the plaintiff. The claims of an alleged co-tenant are not embraced within this provision. A co-tenant does not claim through or under his fellow co-tenant, but independently of him through his own line of title. In the particular case, the titles of plaintiff and the defendants have been separate and distinct from the beginning, and they do not even trace their origin through a common grantor.

There is no contention here that defendants ever gave plaintiff or any of his predecessors in the McManus line a lease on any part of this claim, or that McManus or his heirs acquired their alleged interest by contracting with Victoria Johnson or with the Lobells or with the Federal Company, or through or under either defendant in any other fashion. The very burden of the complaint is that McManus acted for himself, made his own location, was himself the primary recipient of title. If so, his successors must stand on their own feet. They claim through and under McManus, and no one else.

The words "through" and "under" have been used in Statutes or formal documents before and received definition in the courts.

In *Bates v. Independent School District*, 25 Fed. 192, 194, the word "under" is defined by Judge Shiras:

"The word 'under', however, has a different signification. Primarily it is the correlative of 'over' or 'above', and signifies being in a lower condition or position; and secondarily, it indicates a relation of subjection or subordination to some superior power, higher authority or controlling fact."

In *Lamb v. Kaman*, 1 Sawy. 238, "Daniel H.", who had not then received the government title, was one of the grantors of a piece of land in Oregon by special warranty deed, in which he warranted against the claims of all persons claiming "by, through or under" him. At the time the deed was given the land was owned by the United States, and the Donation Act had not been passed. Later the same land was patented to "Daniel H." under the Donation Act. The heirs of "Daniel H." were allowed to quiet title against claimants under the earlier deed. Judge Deady said in the opinion:

"At the time Daniel H. made this covenant against any person claiming through himself, he had no estate or interest in the premises except the bare possession. That the title was in the United States was well known to all the parties to the deed—particularly the grantee, Chapman. Afterwards the United States saw proper to grant the premises to Daniel H., and the 'claim, right or title' now set up to the premises by his heirs, is that of the United States and not that covenanted against by their ancestor."

This plainly shows that titles claimed "through" and "under" are not interpreted by the courts as including separate titles from different sources.

In *McCracken v. Taylor*, 146 S. W. 693, the question was presented to the Texas Court of Civil Appeals of whether a wife, who claimed property as a community homestead, was in any sense claiming "under" her husband. In holding that she was not, the Court says (page 695):

"We have been cited to no authority, nor are we able to find any, that would warrant our here holding, under the Constitution and laws of this state, *that the appellee Mrs. Taylor held her right and interest in the homestead and community property 'under' her husband, George M. Taylor.* We think this view of the interest and right of the wife in such property is in contravention of the spirit of the Constitution and all of our legislation, *which views the marital relation as a partnership, wherein the partners have equal title and interest in the community property and homestead, and neither can be held as holding their interest in such property 'under' the other.* It is clear from the record in this case that Mrs. Taylor's claim, by virtue of which she recovered in the suit referred to, was not derived from conveyance or right of heirship from any one or more of the grantors in the deed, and no relationship, contractual or otherwise, is shown between Mrs. Taylor and the grantors, except that it is alleged that she was the wife of one of them, to-wit, George M. Taylor, and as such was permitted to recover. But this relationship, as above indicated, *we think clearly insufficient to support the contention that Mr. Taylor's claim to the homestead was under George Taylor within the meaning of the warranty clause of the deed to appellant.*" (Italics ours.)

The inuring clause as we view it was never intended to cover such a situation as that presented by the plain-

tiff. If he or his grantors ever had any claim to these premises, that claim was not derived *through* or *under* the defendant. If it had any existence at all it was equal, superior or paramount, and as such should have been made the basis of a superior or coordinate application within the statutory period of six months after the passage of the Act, or should have been set up within that time in response to the published notice calling upon all persons having claims of this type to present them for adjudication.

In addition to this, the claim of plaintiff does not arise out of a relationship established with anyone "*by lease, contract or otherwise*".

Plaintiff devotes most of his discussion of this point to an attempt to get away from the *ejusdem generis* rule of construction, and to broaden the final general term, "*or otherwise*", so as to make it include all manner of claims to the same land, whether based on leases, contracts or other similar title instruments executed by the government lessee, or based upon an alleged independent status such as that asserted by an independent fractional owner.

If the theory of plaintiff as to the meaning of the inuring clause were adopted, then it would render meaningless the sentence above quoted in Sec. 18 immediately preceding the inuring clause, to-wit:

"In case of conflicting claimants for leases under this section, the Secretary of Interior is authorized to grant leases to one or more of them as shall be deemed best."

Under plaintiff's theory, no matter who might be awarded the lease, a rival claimant could always say that he claimed through or under the successful applicant by lease, contract or otherwise, whenever the imposition of a trust was claimed to be the appropriate remedial measure.

We submit that these two provisions of Sec. 18 are to be read together; that the decision of the Secretary of the Interior in awarding a lease among possible applicants is final; and that the only matter left to pass by inurement is the subordinate right of one whose title had its inception in a lease, contract or some similar instrument to which the lessee is a party. Under the doctrine, therefore, of *expressio unius exclusio alterius est* the possibility of inurement upon the basis of cotenancy is cut off.

The plaintiff argues that the *ejusdem generis* rule cannot be called in as an aid to the construction of the statute in this case; for by doing so, he contends, the general words would be meaningless or surplusage. (See his brief, pp. 141 and 150-151.) To sustain this contention, he cites and quotes from several cases where the words of the Court seem to lend him encouragement. They speak about the rule being only "an aid to construction", and not being a "cast-iron rule" which overrides all other rules of construction. This is perfectly true, but the exception established by all these cases is simply that, *if the particular words exhaust the class*, then the general words must be construed as embracing something outside of that class. And the reason for this exception is that, if possible, no words of a statute will be rendered meaningless.

When we look at the clause of the statute in question in this light, we see it to be clearly one where the general rule should be applied rather than the exception. The particular words "lease, contract", as being means by which one claims "through or under", do not in any way exhaust the class, so as to leave nothing for the general words. One need mention only "mortgage", "assignment", "lien", "working interest", or "royalty covenant" to give the general words, "or otherwise", a great deal of meaning.

But, the plaintiff contends, why should any statutory enactment be needed to protect a class of interests, which have always been enforced in equity, against a new substitute title? The answer lies in an examination of the whole Leasing Act and what it purported to effect. The Act provided for a new kind of government title radically different from anything previously used. The government lease is not a mere substitute title for an earlier placer location. The basic idea of Section 18 of the Act was to give relief to claimants whose placer titles were defective, but to require of them proof that they had good faith possession of the land, that that possession was of a certain degree of continuity and that they had drilled a well—a degree of development never required by the placer laws. Congress probably thought there would be much confusion as to just how far the granting of this new kind of title wiped clean the old slate even of the contractual commitments of the lessee. There would be two kinds of claims having relation to any application for such a new title—those “conflicting” with it in whole or in some fractional part, and those claiming “through or under” it. Each of these classes Congress thought best to take care of by a separate clause. Even if either or both clauses were merely declaratory of principles of common law, it can hardly be said that “Congress indulged in a vain enactment”. (Quoted from plaintiff’s brief, p. 136.) As we have shown above it is rather plaintiff’s contention that would render one clause of this statute vain; for if he can bring a claimant in his position under the inurement clause, he would rob of all meaning the clause immediately preceding it relating to “conflicting” claims. The plaintiff abjures in strong language any attempt to make part of the words of the statute meaningless, yet that is the obvious result to which an adoption of his contention would lead. Each clause in this statute was put there by Congress with a purpose. Under the *ejusdem generis* rule of construction every word and every clause has a meaning.

IV.

**PLAINTIFF IS NOT ENTITLED TO RECOVER
UPON THE THEORY OF "MISTAKE
OF LAW".**

The primary theory of recovery presented by the legal conclusions incorporated in plaintiff's bill of complaint is that the Secretary of the Interior committed a mistake of law in awarding the lease in question as an entirety to the Federal Company. This theory is developed in pages 152 to 170 of plaintiff's brief.

The general rule announced by a long line of decisions of this Court is that the solemn conveyance by the United States of a title to land (evidenced in most cases by a patent, in the case at bar by a formal lease) constitutes something more than a mere transfer of title. These conveyances issue only at the close of public proceedings in the General Land Office under the supervision of the Secretary of the Interior, in which it is the duty of the officers of that Department to determine the propriety of passing Government title, in each specific case, and to inquire into the right of the applicant to receive a conveyance. By reason of this function, these conveyances savor of judgments *in rem* and enjoy a degree of certainty and finality to which the deeds of private parties do not attain. This is ordinarily expressed in the statement that conveyances from the Government are not open to collateral attack. The reason for this rule is stated by Mr. Justice Field in *St. Louis Smelting and Refining Company v. Kemp*, 104 U. S. 636, 641:

“If intruders upon them could compel him, (the holder of a government mineral patent) in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to

it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation.”

The exceptions to this general rule are very limited. The recognized exception within which plaintiff has attempted to plead his case has arisen out of a series of decisions of this Court and may be stated somewhat as follows: *If it appears affirmatively that, but for a pure error of law committed by the General Land Office, the plaintiff could and would have received the identical thing which was awarded to the defendant, a court of equity will correct the result of the Land Office decision by imposing a trust in favor of the plaintiff.* Some of the cases most fully defining this doctrine and its limitations are the following:

Silver v. Ladd, 7 Wall. 219;

Shepley v. Cowan, 91 U. S. 330;

Bohall v. Dilla, 114 U. S. 47;

Lee v. Johnson, 116 U. S. 48;

Downs v. Hubbard, 123 U. S. 189;

Ross v. Day, 232 U. S. 110;

Anicker v. Gunsburg, 246 U. S. 110;

Fisher v. Rule, 248 U. S. 314;

Durango Land and Coal Company v. Evans, 80
Fed. 425;

Kendall v. Long, 66 Wash. 62.

On pages 152 to 154 of his brief plaintiff attempts to point out some six errors of law committed by the Commissioner of the General Land Office and the Secretary of the Interior in awarding the lease to the Federal Company. All of these alleged mistakes relate to the construction assumed to have been placed by the Commissioner upon the so-called “power of attorney” given by George McManus to Cy Iba and Shepherd Fales in 1884. Since the plaintiff has refrained from setting out

in his bill the language of this instrument, it is impossible to say whether the construction placed upon it by the Commissioner was the correct one or not. It is disclosed in the bill that this so-called power of attorney was a rather intricate document, not only authorizing the location of mining claims, but also containing words of present grant in favor of the attorney, and reciting a valuable consideration passing from the attorney to the principal. All of plaintiff's criticisms of the interpretation placed by the Commissioner upon this instrument, may be boiled down into the contention that this so-called power of attorney could be exercised only by the *joint* action of Cy Iba and Shepherd Fales, and that the deeds through which the Federal Company traced its title to this old mining location were executed by only one of the attorneys-in-fact, to-wit, Cy Iba. What, if any, rights of survivorship between the two men named as attorneys-in-fact, or what power of substitution or attempted substitution may have existed or have been proved to the satisfaction of the Commissioner are not touched upon nor their presence negatived by the bill. The bill purports to quote only a portion of the Commissioner's decision, and for all that appears from the bill, the parts of the decision omitted may have given additional valid reasons for arriving at the same result.

But even if we should assume that the Commissioner of the General Land Office and the Secretary of the Interior placed some erroneous legal construction upon this part of the evidence before them, plaintiff's bill fails in four distinct respects to plead a case within the doctrine of "mistake of law" announced in the foregoing cases. We shall consider these separately in the following subdivisions indicated as (a), (b), (c) and (d).

(a) *Plaintiff has not and cannot show that he or his predecessors in interest were entitled to receive a lease in respect to this land from the United States.*

The cases cited *supra* lay down the rule, very clearly, that in order for plaintiff to obtain relief it is not enough for him to show that the Secretary of the Interior has announced a decision containing legal error. There is no standing reward open to persons who may succeed in pointing out a flaw in the legal reasoning of a Secretary of the Interior or of a Commissioner of the General Land Office. The real requirement of this doctrine is that the plaintiff must show that but for the legal error into which the Secretary of the Interior is alleged to have fallen he himself should have and would have received the Government conveyance for part or all of the very same thing which was, through the error, conveyed to the defendant. To state the same thing in still another way, the specific legal error complained of must have been the controlling ground upon which the Secretary has declined to recognize a valid claim to the land in question regularly and properly asserted by the plaintiff. This phase of the rule is stated with the greatest clearness by Mr. Justice Field in the case of *Bohall v. Dilla*, *supra*, who says (p. 50):

“To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant.”

This case has been cited many times, with approval, but no judge has ever succeeded in stating the rule more clearly.

The application of this rule in *Downs v. Hubbard*, *supra*, is of some interest. There Congress had set a maximum of one hundred thousand acres as the aggregate amount which would be recognized as equitably belonging to the grantees of Vigil and St. Vrain, in the old Las Animas grant of some four million acres, and it delegated to the Land Department the duty of passing upon the claims of the several grantees. The total claims of grantees, which were presented, were for a much greater acreage than the aggregate which Congress authorized the Department to award. The Department, therefore, awarded the maximum at its disposal to the claimants whose claims it considered the most meritorious. As a result of this, plaintiff's predecessor was left out entirely. Plaintiff sought to impose a trust upon the land of a successful applicant and alleged that the successful applicant had received his land through mistakes and fraudulent collusion with the officers of the Land Office. The Court refused to consider his contention for the reason that the only thing to which plaintiff might originally have been entitled was other and different land from that awarded to the defendant, and that not having shown himself entitled to receive the very same thing which the defendant holds, equity could not clear up the entire situation by imposing a trust. It was not enough that by reason of the congressional maximum an improper award to the defendant inevitably prevented plaintiff receiving that other thing to which he claimed to be entitled.

The special pertinency of *Downs v. Hubbard* arises out of the fact that in the case at bar plaintiff places his chief reliance upon the contention that at some stage in this situation his predecessors were eligible to apply

for a fractional interest in a patent under the mining laws, and that it now appears that defendants block any opportunity to obtain a patent by having an oil and gas lease from the Government covering the same land. Plaintiff does not show that he ever applied for a patent; or that he or his predecessors were ever entitled to a lease. In fact, it appears clearly that they did not apply for any patent; and were not entitled to a lease. As a condition precedent to granting a lease, Section 18 of the Leasing Act makes certain definite requirements. It was necessary, in the first place, to apply for a lease. Plaintiff did not do that; although the way was open to him, under Regulation No. 24 $\frac{1}{2}$, to base an application upon a claim to a fraction. He did not relinquish his claims under the Mining Act. He did not show, or offer to show, that prior to July 1, 1919, he was in undisputed possession of the land. He has made no attempt to pay the Government one-eighth of the value of any oil and gas that he and his predecessors may have produced. These are not formal matters; they are by statute made conditions precedent to the granting of a lease. The period of time within which these matters had to be done expired with August 25, 1920. Not only did the Land Department commit no error in failing to grant a lease to plaintiff or his predecessors, but that Department, in the absence of compliance with these conditions precedent by plaintiff or his predecessors within the six months' period, had no power whatever to grant him a lease.

This type of situation has been passed upon by the Land Department, in the decision of *C. D. Murane*, 48 L. D. 526, in which the Secretary of the Interior held that it did not lie within the power of the General Land Office to issue or set aside in favor of one not before the Department a fractional interest in a lease, where it had been revealed, in connection with the application of others, that the person not before the Department would

have been entitled to such fractional interest had he applied. Under such circumstances the Government itself retains the interest in the land not applied for, and sells a lease thereon at public auction under Section 17 of the Leasing Act. The right to receive a lease under Section 18 of the Act is a privilege which is lost if not exercised in conformity with the Act and the regulations.

In an attempt to get away from this well established line of decision, plaintiff places much reliance upon the case of *Duluth & Iron Range R. Co. v. Roy*, 173 U. S. 587. It appears that the plaintiff in that case, in order to impose a trust under the doctrine of "mistake of law", was not required to show that at the precise moment the patent issued to defendant, the plaintiff had *completed* his right to a patent. In that case the plaintiff had not made final proof. There this Court, as a comment on *Bohall v. Dilla* and other cases, made use of the language quoted by plaintiff on page 164 of his brief, viz.:

"We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; may not have reached it, and yet justify relief, as in *Ard v. Brandon*, 156 U. S. 537; and in *Morrison v. Stalnaker*, 104 U. S. 213."

But it will be noted from the excerpt quoted by plaintiff that the Court goes on to say:

"And because of the well established principle that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the

misconduct or neglect of a public officer, the law will protect him." (Italics ours.)

In the case at bar, when the lease issued to the Federal Company, neither the Land Department nor the defendants had, in any way, obstructed or prevented the plaintiff or the McManus heirs from obtaining a lease. The thing that did stand irrevocably in his way was the fact that the McManus heirs had at that very time, before the Secretary rendered any decision whatever, permitted every possible opportunity of obtaining a lease for themselves to expire. August 25, 1920, was past, and through their own failure, not through any obstruction by the defendants or the Land Department, their right even to seek a lease was dead. There had been no misconduct or neglect of defendants or of any public officer in this.

The *Duluth & Iron Range Company* case was never intended to be stretched to such a situation. It makes provision only for those cases in which, by reason of the erroneous ruling of the Land Department at some early stage of the proceedings, the plaintiff was never permitted to go on and do what otherwise he would have done to perfect his claim to the land. Misconduct or neglect of a public officer preventing the plaintiff from completing his title is the very essence of this doctrine.

This distinction is clearly recognized in the case of *Pierson v. Loveland*, 16 Idaho 628. There a rejected applicant attempted to impose a trust upon land granted under the Carey Act. The plaintiff had started a contest against the successful defendant, which the State Board refused to hear; thereupon, he took an appeal to the courts instead of prosecuting a writ of mandamus against the State Board. The Court reviews the case of *Bohall v. Dilla*, and similar cases, especially those like the *Duluth* case, in which protection has been given to a plaintiff, whose right to patent was incomplete. In refusing relief, the Court said:

“As he neglected and failed to do and perform those things (mandamus, the hearing of his contest, etc.), he is not in a position to maintain this action, for, under the well settled rule of law in this class of cases, the plaintiff must allege the performance of all the acts required by law necessary to show that he was entitled to the patent at the time the action was commenced, *with the exception of those acts which he was prevented from performing or offering to perform by reason of the error of law committed by said board.*” (Italics ours.)

Upon this general point plaintiff also sets out at length in his brief, pages 156 to 162, almost the entire opinion of this Court in the case of *Johnson v. Towsley*, 13 Wall. 72. The special pertinency of the case is not apparent. It is one of the earlier decisions of this Court dealing with the general question of relief in equity against the result of a pure mistake of law upon the part of the Land Department. We do not question the existence of this well recognized branch of equity jurisdiction. In *Johnson v. Towsley*, however, this Court had no occasion to go in detail into the numerous qualifications and restrictions surrounding this type of relief. These later refinements of the rule are expressly considered by this Court in the cases of later date which we have here discussed, and to the extent that any general language appearing in the decision of *Johnson v. Towsley* might be thought, if standing alone, to go beyond the statement of the rule for which we are here contending, we submit that the later decisions of this Court must be deemed to have restricted and qualified the earlier decisions. The same considerations apply to the still earlier cases of *Lytle v. Arkansas*, 22 How. 193, and *Garland v. Wynn*, 20 How. 6, to which plaintiff also refers.

In the recent case of *Anicker v. Gunsburg*, *supra*, this Court restates the rule with the qualifications and limitations announced in *Bohall v. Dilla* in language which recognizes the distinction for which we contend. The Court says (246 U. S. 117):

“In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary. *Bohall v. Dilla*, 114 U. S. 47.”

The decision of the Circuit Court of Appeals in the case at bar, from which the plaintiff is prosecuting this appeal, covers this specific point very clearly. The Circuit Court of Appeals said (*Hodgson v. Federal Oil and Development Company*, 5 Fed. (2nd) 446):

“The question then under the third ground of the motions is narrowed to whether the appellant may impose a trust on a leasehold that neither he nor his grantors at any time were or now are entitled to receive, or any part thereof, from the lessor. We think the law on this question is well settled. The rule is aptly stated in *Anicker v. Gunsburg*, and others, 246 U. S. 110, where it is said:

“‘In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary.’

“See, also, *Duluth & Iron Range Railroad Co. v. Roy*, 173 U. S. 587; *Bohall v. Dilla*, 114 U. S. 47.

“Because the bill fails to allege compliance or an attempt to comply with the requirements of Section 18 of the Act of Congress approved February 25, 1920, it does not state a cause of action in equity, and therefore was properly dismissed for want of equity under the third ground of the motions to dismiss.” (Italics ours.)

(b) *The decision of the Secretary criticised by plaintiff is a determination of a mixed question of law and fact.*

The particular phase of this general doctrine of equitable relief from “mistake of law” considered in the case of *Ross v. Day*, *supra*, is that only a pure mistake of law will be corrected. The findings of fact of the Interior Department are final; and even where it appears that the question decided was a mixed question of law and fact the courts will not grant relief.

Ross v. Day was an Indian allotment case under the Act of July 1, 1902, by which an allottee was permitted to select lands upon which he had placed “improvements”. Both parties applied for the same land, each claiming that he had improvements thereon. The Land Department decided in favor of the defendant. The other party thereupon instituted a suit to impose a trust. The findings of fact of the Department are pleaded so that the Court had no difficulty in seeing just what the Department considered to be “improvements”. The State Court in which the suit to impose a trust was brought, dismissed the suit and was affirmed by this Court. In the opinion Mr. Justice Pitney says (232 U. S., page 116):

“But, in our opinion, whether plaintiffs had improved the lands in such sense as to give them a preferential right under the statute was not a mere question of law, but rather a mixed question of law and fact. So far as it involved an appre-

ciation of the term 'improvements', as employed in the statute, it was a question of law; so far as it involved the drawing of correct inferences from the evidence, it was a question of fact. At best, it was a close question, about which reasonable men might well differ.

"In *Whitcomb v. White*, 214 U. S. 15, 16, this court, speaking by Mr. Justice Brewer, said: 'The decision of the Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact, it is conclusive upon the courts (citing cases). And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in *Marquez v. Frisbie*, 101 U. S. p. 476: "This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive".' "

A perusal of the fragment of the Secretary's decision quoted in the bill (R. fols. 13 and 14) will show that the questions passed upon by the Secretary are, some of them, pure questions of fact, based upon evidence which the plaintiff has made no attempt even to review or summarize, and that the particular matters of which plaintiff complains are, at most, mixed questions of law and fact of such a sort that the matters of fact may have been the controlling considerations. It is impossible to say from this fragment of the decision that

the Secretary committed any pure mistake of law. All that appears is that, in the opinion of the Secretary, the Federal Company had acquired the fractional interest in the placer claim which had originally belonged to McManus. In reaching this conclusion, it is apparent that the deeds executed by Cy Iba and the words of grant contained in a power of attorney are treated as having a material bearing, and that Cy Iba was regarded as having had the power to pass on to his grantees whatever title McManus held. Upon all these matters it is evident that the Secretary went into extrinsic questions of fact not summarized in this fragment of his decision. Some of the questions that suggest themselves are: Who performed the physical acts of location and upon what understanding with McManus? When did Shepherd Fales die? Did Fales also make any conveyance or attempt any ratification of the acts of Cy Iba? Was McManus present when Cy Iba executed the first deed to Johnson? What was the character of the possession of the property in the hands of Johnson and the Lobells? Had any conduct upon the part of McManus evidenced abandonment? All these matters are questions of fact. They are necessarily interwoven with any matters of law involved in the Secretary's decision, and it is impossible to say that upon any point a pure mistake of law has been made.

(c) *Plaintiff has failed to plead enough of the record in the General Land Office to present the question of "mistake of law"*.

In the case of *Durango Land and Coal Company v. Evans, supra*, the Circuit Court of Appeals for the 8th Circuit in an opinion by Judge Thayer laid down very definite requirements in respect to what must be pleaded when the theory of "mistake of law" is relied upon. In that case the plaintiff sought to impose a trust upon certain coal lands, which had been patented to the de-

fendant. It was alleged in the bill that the defendant had exhausted his coal rights prior to making the entry; that the plaintiff had contested the application in the Land Department and been ruled against. Upon certain points the plaintiff made the general allegation that there was no evidence received by the Land Department in respect to certain issues. The Court says (80 Fed. 430):

“A fundamental defect in the bill in this respect is that it fails to set out the evidence which was laid before the land department or to state what the department found the material facts to be, in such a manner that the court can separate the department's findings of fact from its conclusions of law, and see clearly wherein a mistake of law has been made. It is alleged in one paragraph of the bill ‘that there was no evidence before the said land department at said hearing or contest showing that the said entry of the said McMaster was unlawful or invalid in any respect, and that there was no evidence in said pretended contest upon which the said pretended entry of the said Evans should or could legally have been allowed.’

“These allegations, however, merely state the opinion of the pleader with reference to the evidence which was laid before the department, and for that reason they are merely conclusions of law. To enable a court to decide whether the conclusions so stated are right or wrong, all the testimony with respect to which the aforesaid opinion is expressed should have been set out, inasmuch as the question whether there is any evidence tending to establish a given fact is a question of law, which can only be determined after all the testimony has been considered and examined.”

And again (page 431):

“The contest having been tried and determined before a special tribunal constituted for that purpose, its judgment can only be overturned for errors of law, by showing that it misconstrued or misapplied the law applicable to the case made before the land department, and the bill of complaint does not advise us what evidence was produced before the department relative to Evans’ qualifications to enter coal lands, or relative to his acts of abandonment. This court cannot say that the law was misconstrued by the officers of the land department, unless their findings upon questions of fact are disclosed, or enough undisputed facts are disclosed, which were proven before the department, to make it plain that an error of law was committed, and that the complainant company was thereby deprived of its rights. *Marquez v. Frisbie*, 101 U. S. 473, 476; *Sanford v. Sanford*, 139 U. S. 642, 647, 11 Sup. Ct. 666. No decision by the land department would have any weight, or afford any protection to a successful litigant in that department, if, without any statement of what the facts were as presented to the department, the whole controversy could be opened in the courts by general allegations, such as are found in the present bill, that the successful litigant had exhausted his right to enter land, or was otherwise disqualified, or had abandoned his entry. These are matters which were properly cognizable before the land department when the contest was pending. The presumption is that all such questions were brought to the attention of the department, and were duly considered and properly decided. The burden was on the complainant, therefore, when it sought to reopen the controversy for errors of law, to show

what the facts were before the land department to which the law was applied. We are forced to conclude that, by the averments of the present bill, this burden was not successfully discharged."

On pages 166 to 170 of his brief, plaintiff attempts to show that his bill in the instant case complies with the rules of pleading laid down in the *Durango* case, *supra*. He insists that all the facts necessary to an understanding of the legal conclusions reached by the Land Department are set forth in his bill; but no matter what the plaintiff may now assert in his brief he has disclosed with perfect plainness on the face of his bill (R. fol. 13) that the matters set forth in the bill were found "*inter alia*" by the Secretary of the Interior and by the Commissioner of the General Land Office. Thus it appears affirmatively that other matters not pleaded were also found by these officers. No attempt whatever has been made to summarize these other findings nor to summarize at all the evidence before the Land Department. In later subdivisions of the bill the plaintiff does refer to certain entries in the abstract of title which was filed with the Department in connection with the Federal Company's application as one of the pieces of evidence considered by the Department. Even with respect to these entries in the abstract of title, plaintiff has pleaded the book and page of record with far more particularity than he has used with reference to the recitals and effective words of grant of the entries themselves. Plaintiff does not purport to have pleaded or summarized all of the entries appearing in even this abstract of title, but states only his conclusion that the particular entries selected by him are the ones upon which the Secretary of the Interior relied. This falls very far short of compliance with the pleading requirements of the *Durango* case.

There is nothing in the decision of Judge Sanborn announced in the case of *James v. Germania Iron Co.*,

107 Fed. 597, to which plaintiff refers in this part of his brief, overruling or conflicting with the pleading requirements laid down in the *Durango* case.

(d) *Plaintiff has failed to exhaust his remedies in the Land Department.*

This question has rarely arisen for determination, because in virtually every case of this type decided in the courts, it appears affirmatively that the plaintiff had followed out to the end every channel open in the Land Department before attempting to invoke the aid of the courts; in fact, the error of law complained of in virtually every case is involved in a decision *against* the plaintiff in some contested proceeding before the Land Department to which the plaintiff had been a party. This phase of the rule, however, has arisen squarely in the case of *Kendall v. Long, supra*. There the plaintiff sought to impose a trust on land patented to defendant as a homestead. Plaintiff had sought to make an entry of the same land, but was rejected by the Local Land Office; later he made some attempt to file a contest, which was held insufficient by the Local Land Office. He took no further part in the proceedings until after a patent had been issued from the General Land Office, at which time he commenced his suit. In declining to consider the case, the Supreme Court of the State of Washington says (66 Wash 68):

“He took no appeal to the General Land Office or the Secretary of the Interior from that order, and the courts will not entertain a suit in equity to charge the legal title to land under a patent with a trust based on an erroneous decision of an inferior officer of the land department when a right of appeal to a superior office therein exists. In other words, a party aggrieved by an erroneous decision of the land department must exhaust his

remedies in that department in an effort to obtain relief before he can resort to the courts for that purpose."

The plaintiff in the instant case is in even worse position—the proceeding under which this land was leased to the defendant was started by a published notice to all the world. There was an opportunity in the local land office for plaintiff, or his predecessors in interest, to appear and contest either by asserting a right under the Mining Act, or by filing within the time provided by statute a conflicting application for a lease. Nothing of the sort was done. The matter passed on to the General Land Office. It was there decided and later affirmed by the Secretary of the Interior. In all of these proceedings plaintiff and his predecessors in interest have failed to ask relief and exhaust their remedies. Under the doctrine of *Kendall v. Long, supra*, they have laid no basis for a suit to impose a trust upon the resulting lease.

In concluding this subdivision of our brief, we repeat that the doctrine of equitable relief from a mistake of law committed by the officers of the General Land Office is hedged about with all the requirements laid down in the cases which we have here considered, as well as in many other cases decided by this Court. The bill of complaint filed by the plaintiff fails to bring his case within the limits of this doctrine, and fails to state facts sufficient to warrant this Court in reviewing or changing the results of the decision arrived at by the Secretary of the Interior. The lease awarded the Federal Company is, therefore, good against this collateral attack, and stands as a final adjudication of the rights of the parties in the land.

V.

**PLAINTIFF IS BARRED FROM SEEKING RELIEF BY
THE EXCESSIVE DELAY AND INACTIVITY OF
HIMSELF AND HIS PREDECESSORS.**

It is clearly disclosed upon the face of the bill that plaintiff and his predecessors in interest have been guilty of such delay that no court of equity can give relief at this late date, whatever their rights at some past date may have been. This result may be reached by following four independent lines of analysis which we shall discuss separately under the letters (a), (b), (c) and (d). (a) The period of the Statute of Limitations of Wyoming "for the recovery of the *title* or the *possession* of lands" is ten years. (Sec. 5564, Wyo. Comp. Stat. 1920, printed in full, Appendix, p. 98.) This period ran in full against the McManus heirs between July 3, 1910, and August 21, 1920—the date of the Federal Company's lease application. Since all claim of the McManus heirs to a fraction of the legal title in the old placer location had been cut off before any lease was applied for, no equitable claim to a share in the lease could ever have arisen. (b) Section 18 of the Leasing Act itself makes "possession of such land, undisputed by any other claimant prior to July 1, 1919", a condition which the applicant must meet to obtain a lease. This should be construed a special Statute of Limitations, barring any assertion of right to a lease by anyone who had not at least challenged the applicant's possession at as early a date as July 1, 1919. Clearly the McManus heirs did nothing of this sort. (c) Section 18 of the Leasing Act makes application for a lease and relinquishment of former title within a specified six month period, which expired August 25, 1920, an absolute prerequisite to obtaining a lease from the government. After the period had expired, all right to obtain a lease by suit in equity is

likewise barred. (d) The equitable doctrine of laches cuts off all stale, speculative attempts to obtain an interest in property under such circumstances as are shown to have surrounded plaintiff and his predecessor in this case.

In order to make the application of all four of these lines of defense more apparent, we here review the facts disclosed by the bill from the point of view of the delay, neglect and acquiescence which have at all times characterized the conduct of plaintiff and his predecessors.

Cy Iba held from George McManus an instrument called a power of attorney which in addition to the powers created, also contained words of present grant from McManus to Iba and Fales. In 1890, expressly purporting to act as attorney in fact for George McManus among others, Cy Iba gave a deed for a half interest in this old placer claim to Victoria Johnson. If this act was not within the legal powers of Cy Iba, it was at least a perfectly definite hostile assertion of a right to deal with the McManus fraction. This deed was spread on the public records in Wyoming in 1895. George McManus was alive for six years after this deed was recorded. There is no averment that he was ignorant of the deed at any time, nor is there any averment to show that he lived elsewhere than in the vicinity of the land. There is nothing in the bill to show that George McManus ever repudiated this deed or ever challenged the title acquired by Victoria Johnson thereunder. That deed had been recorded over twenty-seven years before this suit was instituted, and there is no explanation of that delay (except the assertion that after the death of George McManus his heirs were ignorant).

In 1905 Cy Iba executed a deed to Joseph Lobell for the other half interest in the claim. This deed was promptly recorded. It also was at least a hostile asser-

tion of title, but there is nothing to indicate that its validity was ever questioned until this suit was commenced sixteen years later. Ignorance and absence from Wyoming are the only excuses pleaded.

Joseph Lobell received a deed covering the Victoria Johnson half in 1907. In 1915 he deeded all his title to the Federal Company. These deeds were promptly recorded and were never challenged until this suit was begun in 1922.

In its application for a lease the Federal Company alleged, "The said claim has been claimed and possessed continuously since prior to July 3, 1910, by this claimant and its predecessors in interest, and is now claimed and possessed by it." (R. fol. 11.) This it was required to prove under Section 18 of the Leasing Act. The issuance of the lease to it stands as a finding of fact by the Secretary of the Interior that this allegation was true.

The issuance of the lease to the Federal Company is also a finding that as a matter of fact the possession of the land by the Federal Company on and prior to July 1, 1919, was undisputed by any other claimant.

In its application the Federal Company explicitly alleged that it was the owner of the McManus fraction in the old placer claim. (R. fol. 10.) It filed with the Department a complete certified abstract of the title,—thus frankly disclosing everything connected with its title situation. And, under the requirements of Regulation No. 27, it caused a notice to all persons having any claim to the land under the Leasing Act, or any other public land law, to be published for thirty days, advising them of its application and requiring conflicting claims to be asserted. There is no suggestion even that any suppression of facts or concealment ever characterized any of the dealings of the Federal Company and its predecessors,

with the land; on the contrary, the widest sort of publicity existed at all times. The lease was granted in April, 1921.

In February, 1922, almost a year after the lease had issued, and a year and a half after the final date for making lease applications had expired, plaintiff purchased whatever rights the McManus heirs might have. When and in what manner *plaintiff* first learned of the alleged title defect out of which the possibility of this lawsuit arose, he does not disclose; the allegation of ignorance is confined to the McManus heirs; neither does plaintiff say what price he paid the McManus heirs for this alleged title. He avers that the McManus heirs never knew of the existence of this old placer title, or of any possible rights they might have under the Leasing Act until the same date in February, 1922, which in another paragraph he fixes as the date of his purchase of the title claim from them. The inference that the whole transaction originated with the plaintiff, and was a speculative purchase of a title flaw which might be used as the basis of a lawsuit against the operator of a profitable lease—alleged to be worth over two million dollars—is very strong indeed. Plaintiff commenced his suit in May, 1922.

We now turn to the separate consideration of the four respects—stated above—in which this delay should be held to bar recovery.

(a) THE WYOMING STATUTE OF LIMITATIONS. The period fixed by the section relating to recovery of *title* or *possession* of land is ten years. In the period from July 3, 1910, to August 21, 1920, more than ten years had run. This is disclosed on the face of the bill by the fact that in its application for a lease, filed August 21, 1920, the Federal Company alleged to the Department that it and its predecessors had claimed and possessed this claim continuously since prior to July 3, 1910. The

proof of this allegation was necessary under Section 18 of the Leasing Act. Therefore the issuance of the lease must have involved a finding by the Department of the truth of the allegation. This finding of fact cannot be attacked in this collateral proceeding. From this we draw the conclusion that before the lease was ever applied for, the McManus title had been cut off by the Wyoming Statute of Limitations, so that when plaintiff in 1922 took a quit claim deed from the McManus heirs, he got nothing, and has no status upon which to base a suit.

There is nothing in the bill to indicate that during any part of this ten year period, any of the McManus heirs was a minor or under any other disability. Neither did the fact that this land was within the limits of the Executive Withdrawal Orders of September 27, 1909, and July 2, 1910, operate to suspend the running of the Statute of Limitations. Judge Stone in his dissenting opinion, filed in connection with the decision of this case in the Circuit Court of Appeals, makes the following statement on this point, based upon a misapprehension of the facts. He says (5 Fed. (2nd) 450):

“While I have not been able to procure the withdrawal proclamation to ascertain just what effect it would have upon the exercise of the rights of placer claimants to land covered by the proclamation, yet I apprehend it must have prevented, from the time it became effective until the passage of the Oil Leasing Act (from 1909 to February 25, 1920), any exercise of rights in respect to mineral claims on such land. If that be true, there could, during that period, be no possession or adverse possession by any one in so far as placer minerals were concerned and that period should be regarded as a suspension of rights and duties of rival claimants in respect to such property.”

The major premise upon which this reasoning is based is incorrect. The Withdrawal Order of September 27, 1909, (known as Temporary Petroleum Withdrawal No. 5) specifically excepts from its operation "All locations or claims existing and valid" on its date, which are expressly permitted to "proceed to entry in the usual manner after field investigation and examination". (The full text of this order, except the list of lands, is printed in the appendix to this brief, p. 95.) The Withdrawal Order of July 2, 1910 (known as Petroleum Reserve No. 8) *expressly incorporates by reference and continues in effect the terms of the earlier withdrawal of September 27, 1909, of the same land.* The Act of June 25, 1910, under which the second withdrawal of this land was made goes even farther in excepting from the operation of all withdrawals, both before and after the Act, claims upon which work leading to a discovery was being done at the date of withdrawal. It is of the very essence of the theory of plaintiff in the case at bar that the McManus heirs had a valid existing claim, completed by discovery. If they did not have such a claim, then they have not even a starting point in this Court. If they did have such a claim, then they were free at all times to assert and defend their rights against all intruders. Neither did the existence of the Withdrawal Orders reduce activity upon these lands to a state of quiescence. It is public history that oil production from the public lands within these withdrawn areas was measured in millions of barrels per year throughout the last half of this period.

Plaintiff presents this same fallacious line of reasoning on pages 189-191 of his brief, and in support of it he prints on page 190 of his brief what purports to be a copy of the Withdrawal Order of July 2, 1910 (excepting only land description), but which is totally misleading because *plaintiff has omitted the effective paragraph of the order itself in which the express reference to the*

earlier order occurs. This serious omission is not indicated by asterisks or in any other manner in the purported copy. We print a correct copy of this order (omitting only land description) in the Appendix to this brief, p. 96.

In his further discussion of this topic, on page 191 of his brief, plaintiff adds the incorrect statement that since "July 2, 1910, the Department of the Interior has uniformly refused to entertain an application for patent on any lands embraced within the area of the Supplemental Order, construing it to exclude from further entry valid and subsisting unpatented oil placer mining claims, included within its limits";. There is no averment to to this effect in plaintiff's bill, and in addition to that it is contrary to fact. This Court will judicially notice that, during the period mentioned, the Interior Department received and considered on their merits many applications for patent covering placer claims in the withdrawn parts of this very Salt Creek field, and, based upon these applications, it also issued several patents during this very period within the limits of both withdrawals.

There is no basis whatsoever for contending that the Withdrawal Orders prevented the owners of any *valid* placer claim from developing their lands and obtaining patents thereon. It is true that ever since the time of the wave of conservation sentiment, which produced these withdrawals, the Department of the Interior has scrutinized the facts presented by petroleum placer patent applications with greater care than it did previously, and that it has required applicants to *prove* discovery, and establish the *real existence* of \$500 worth of development work on the claim; but as a matter of law, the Department has never refused to entertain on their merits patent applications for this land.

The other line of reasoning by which plaintiff seeks to escape the bar of the Statute of Limitations is his

theory that a fiduciary relationship existed between Joseph Lobell, and later the Federal Company, on the one hand, and the McManus heirs on the other, of such nature that the possession of the Federal Company and its predecessors was not adverse. We have treated this fully in an earlier section of this brief. No fiduciary relationship existed, nor were obligations of trust ever assumed by the Federal Company. Much of plaintiff's argument upon this topic is filled with confusion between the fiduciary obligations which arise out of an *express trust*, or out of a true *implied trust* where the relationship is implied from facts, and the totally dissimilar situation arising from so-called *constructive trusts*, in which the *trust* never involves trust and confidence between the parties, but is a mere convenient piece of remedial machinery resorted to by the court to correct a tortious situation characterized by open hostility. The fact that a court is asked to impose a *constructive trust* does not mean at all that a fiduciary relationship of trust and confidence has ever existed between the parties. This distinction has been thoroughly recognized by this Court in *Boone v. Chiles*, 10 Pet. 177, and many other cases.

(b) THE PERIOD BEGINNING JULY 1, 1919.

We pass next to a consideration of the clause in Section 18 of the Leasing Act which, after stating certain requirements respecting the lease applicant, goes on to say the applicant "if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States," etc. This seems to us clearly a special Statute of Limitations enacted by Congress with reference to just such a situation as this case presents. If the continuous possession of the claim by the applicant, which, under an earlier clause of the same section must date back at least as far as July 3, 1910, was characterized, on and prior to July 1, 1919, by being "*undisputed by any other claimant*,"

then the claimant presents as complete a possessory title as the law requires. It is then the legislative intent that such a claimant shall not be exposed to the annoyance of title pretensions which came to life only after July 1, 1919, when the assurance of probable legislative relief made Salt Creek title claims infinitely more attractive than they had been. It is a matter of common knowledge that the nine years from July, 1910, to July, 1919, were years of adversity to the claimants of petroleum lands in Salt Creek. The Department of Justice was threatening extensive ejectment actions. The productivity and commercial value of the lands themselves were not really proved until well into the period. At the beginning of this period, no pipe line existed and no refinery or market outlet for oil had come into being, and even after these difficulties were overcome the general level of prices of petroleum products was at a very low level for several years. We believe Congress intended to recognize the persistency of those claimants, who, in spite of uncertainty, clung to their claims to these lands, and drilled wells upon them as a badge of good faith and of equitable right, and that it clearly intended to cut off the mere paper pretensions to title of those who never saw fit to claim an interest while the property was a burden, but now rush to attack the winners after values running into millions have been proved.

By issuing a lease to the Federal Company, the Department found as a fact that its possession had been undisputed by any other claimant within the call of the statute. The Department is the sole judge of this question of fact.

(c) THE PERIOD OF SIX MONTHS FOLLOWING PASSAGE OF THE ACT. Section 18 of the Leasing Act requires the application for lease to be made within six months after February 25, 1920. The reason for a limit is plain. The advantage to the government of the leasing system induced it to place its known petro-

leum lands in production at an early date so that royalties would commence. Under Section 17 of the Act, it planned to sell leases on competitive bidding upon all known petroleum lands in respect to which no preferential rights to leases existed. This rendered it expedient to find out promptly what lands were covered by preferential rights. A short period of six months was fixed by Congress for the presentation of all claims to preference. The Secretary was expressly authorized to decide between conflicting claimants by granting leases "to one or more of them as shall be deemed just". The result of this is that at the very latest the expiration of this six months period marked the end of the time within which a right to a lease on all or any part of a claim could be presented. No exception is made in favor of those who may be ignorant of their rights. The statute is summary in its provisions. The McManus heirs did absolutely nothing during this period. They did nothing till eighteen months more had expired—three times the length of this period, and then they simply quitclaimed to plaintiff for a consideration which is not disclosed. It remained for plaintiff three months later to work up and file this suit.

Upon this general topic, plaintiff argues (Plaintiff's brief, p. 131) that the application of the Federal Company was in law the application of the McManus heirs, that he is only trying to *ratify* and *confirm* what the Federal Company did within the time limited. It is a strange perversion of language to say that an application which in plain, explicit words repudiated the existence of any share therein of the McManus heirs, was in law filed on their behalf, and to say that a subsequent ratification or confirmation of steps taken in open hostility to the McManus title could result in establishing the title so repudiated. Plaintiff cannot ratify a part only of that transaction. If he ratifies the Federal Company application, he must also ratify the allegation contained therein that the

Federal Company had become the owner of the McManus fraction.

(d) THE ENTIRE SITUATION FROM THE POINT OF VIEW OF LACHES, and THE STANDING IN EQUITY OF THIS PLAINTIFF. The doctrine of laches is a distinct contribution made to the law by the chancellors. Its exact limits can never be defined any more than can those of *fraud*. Its essence is delay in the assertion of a right. Courts of equity are not under the same inflexible obligation as courts of law to give a prescribed remedy to every suitor who can prove a case within fixed technical requirements; they are therefore free to require that those who ask the favor of equitable relief present clean hands and show proper diligence. There is no occasion before this Court, nor room within the limits of this brief, to discuss in detail all the cases in which the test of diligence has been applied to a particular set of facts. From all the cases certain general principles applicable to the case at bar stand out, which we will state in short form.

1. *Where delay in the assertion of a right exceeding the analogous period of the Statute of Limitations at law is revealed, a prima facie defense of Laches arises, and it becomes incumbent upon the plaintiff to explain the delay.*

In *Kelley v. Boettcher*, 85 Fed. 55 (8th Circuit Ct. of Appeals), in an opinion by Judge Sanborn, it is stated (p. 62):

“When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on

the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case." (Italics ours.)

In the case at bar the delay is far in excess of ten years, which is the period of the analogous Statute of Limitations of Wyoming. Ten years prior to the date of commencement of this suit would take us back to May, 1912. At that time the final deed from Cy Iba to Lobell was seven years old, and for five years Joseph Lobell had claimed both half interests. During this entire time the McManus heirs were absolutely inactive.

2. *Where the right asserted is to an interest in property of speculative nature, subject to wide fluctuations in value, the doctrine of laches applies with great rigor.*

In *Patterson v. Hewitt*, 195 U. S. 309, the degree of diligence exacted of litigants claiming mining property was under consideration. Mr. Justice Brown, speaking for this Court, says, p. 319:

"Indeed, in some cases the diligence required is measured by *months* rather than by years. * * *

"And in others a delay of *two, three or four* years has been held fatal. * * *

Also, page 321:

"Under such circumstances, persons having claims to such property are bound to *the utmost diligence* in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced." (Italics ours.)

In *Childs v. Missouri K. & T. Ry. Co.* (C. C. A., 8th Circuit), 221 Fed. 219, mining property was also the subject-matter of the suit. In this case the court announces the rule (p. 222):

“And when the property involved is of a speculative nature, such as mining property usually is, a court of equity will refuse to grant relief *even when the suit is instituted before the bar of the statute of limitation had attached.*” (Italics ours.)

In *Taylor v. Salt Creek Consolidated Oil Co.* (C. C. A., 8th Circuit), 285 Fed. 532, the court had under consideration an attempt to impose a constructive trust upon a fractional interest in a Government oil and gas lease in this same Salt Creek field. Judge Kenyon, in his opinion, says (p. 539):

“The nature of the property in dispute may require more prompt action than otherwise. This is especially true as to mining and oil properties such as the situation in the case at bar. There is a special reason as to these properties why the courts should hold the parties to a *rigorous rule as to laches.*” (Italics ours.)

In the case at bar the property is of this very type. When Joseph Lobell acquired his last fraction of the old placer location in 1907, all Salt Creek was a sage-brush waste without a single oil well and with no proved value for petroleum. When this suit was instituted, plaintiff alleges that this one quarter section was worth over two million dollars.

3. *When claims to property of this character are under consideration, the period of time which will be deemed to constitute laches is frequently very much shorter than that of the analogous Statute of Limitations. In fact, delay may be measured by MONTHS rather than by YEARS.*

In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, this Court held a delay of “*nearly four years*” a bar to a

suit respecting oil property. The case has been treated as a leading case and cited with approval many times, both in the Federal and State courts. The court says (p. 593):

“The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for \$1,000 as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. *The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.*

“While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, *the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them.*” (Italics ours.)

In *Great West Mining Co. v. Woodmas of Alston Mining Co.*, 14 Colo. 90, a delay of *two years* is held to bar a suit to set aside a sheriff's deed. This was considerably shorter than the analogous Statute of Limitations. The sheriff's deed was delivered in 1884. Suit was commenced in 1886. The Supreme Court of Colorado says (p. 94):

“Under these circumstances, we are to determine whether the court erred in dismissing the bill on account of the laches of the plaintiff. It is a familiar principle that courts of equity will only grant relief in cases in which the application therefor is made promptly and without unreasonable delay, whatever may be the merits of the controversy. *The necessity for the application of this rule to cases in which the subject-matter of the litigation is the right to unpatented mining property, the only value of which arises from the precious metals contained therein, is apparent.* * * * This case furnishes an illustration of the uncertainty of such values. At the time the attachments were levied the properties were considered of little or no value. The ore extracted would not pay the expenses of taking it out. * * * Afterwards, *by the labor and expenditure of these defendants and their grantors*, the property was shown to be of great value. * * * Although the original proceedings were irregular, should this plaintiff, after years of delay, be now allowed to reap the benefit of the expenditure and hazard incurred by *others*, and which plaintiff was unwilling or unable to take, becomes a pertinent inquiry in this connection. *Upon this question the authorities are certainly with the defendants.*” (Italics ours.)

This case was cited with approval by the Supreme Court of the United States in *Johnson v. Standard Min. Co.*, 148 U. S. 360.

In *Jackson v. Jackson*, 175 Fed. 710 (C. C. A., 4th Cir.), the subject-matter of the suit was coal lands. A delay of three years was held to bar the prosecution of the suit. The court says (p. 719):

“Every case depends on its own circumstances in determining the lapse of time essential to make applicable the doctrine of laches. *It will be applied in cases where only a short period of time has elapsed, where the conditions surrounding the property in controversy have changed, especially those relating to its value, and affecting injuriously the interests of innocent defendants.* * * *

The cases are *many* in which courts of equity have refused to entertain bills where the parties have waited for *four and five years* before attempting to assert their claims, but we deem it unnecessary to refer to them.” (Italics ours.)

4. *In determining laches, means of knowledge or any opportunity through which the facts might with reasonable diligence have been discovered, including the existence of the facts in public records, will be treated as the full equivalent of actual knowledge.*

The rule for which we contend is succinctly stated by this Court in *Wood v. Carpenter*, 101 U. S. 135 at page 140:

“‘Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.’ * * *

Also, page 143:

“‘There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.’”

In *Eiffert v. Craps*, 58 Fed. 470, decided by the Circuit Court of Appeals for the Fourth Circuit, the importance of the accessibility of the facts in some public

record, is commented upon in the following language (p. 472):

“The salutary rule of courts of equity for discouraging antiquated demands requires that the bill shall set forth *why* the complainant has remained so long ignorant of his rights, *and if his averments show that he could have learned his rights at any time, if he had chosen to inquire, or to examine a public record, his bill is to be dismissed.*” (Italics ours.)

Swift v. Smith, 79 Fed. 709, was decided by the Eighth Circuit Court of Appeals, Judge Sanborn handing down the opinion. Here again the availability of the facts in public records is commented upon (p. 713):

“The least investigation in the natural and usual place to make such an inquiry would have led unerringly to a discovery, in 1871, of all the facts which the husband of the appellant learned of his own accord, and brought to her attention in 1891, without any inquiry on her part. She was not the victim of any actual fraud or of any concealment. *All the facts on which she now relies for relief were spread upon the records of the probate court of Pueblo county, and upon the records of the register of deeds at Denver, in 1871, open and ready for her inspection. The natural place to inquire after property of the estate of Russell, when she knew that he had lived and died in Pueblo county, in the State of Colorado, was in the probate court of that county.*” (Italics ours.)

The case of *Teall v. Slaven*, 40 Fed. 774, was decided by Judge Sawyer in the lower court, and affirmed by this court under the title of *Teall v. Schroder*, 158 U. S. 172. In his opinion, Judge Sawyer points out that so far as laches is concerned the effect of the accessibil-

ity of information upon the public records is not dependent upon the technical rules of law which make certain public records constructive notice to a certain limited class of people. It is not a question of *constructive notice* at all; it is a question of *diligence*. Whatever the statutory purpose leading to the establishment of public records, the courts recognize that they immediately become the natural available places from which all sorts of knowledge may be obtained, and the plaintiff who would show diligence sufficient to move a court of equity to act in his behalf must show that he has not neglected to take advantage of the facts which he might easily have obtained from some public record.

Judge Sawyer says (p. 780):

"It is urged, however, by complainants that under the statutes of California, the record of a conveyance is *constructive* notice only to *subsequent* purchasers, and is not such to other parties. Grant it for the purposes of this case; but this is not a question of '*constructive notice*'; it is a question of *diligence*—whether these complainants and their ancestors, have exercised due diligence in ascertaining their rights and pursuing their remedies."

In affirming this same case in the case of *Teall v. Schroder*, this Court says (p. 178):

"As the complainants and all other parties interested could have obtained the necessary knowledge upon those subjects by proper inquiries, they are *charged with such knowledge from the time those conveyances were placed on record*, and held to all the consequences following its acquisition." (Italics ours.)

The discussion in plaintiff's brief of the legal limits of constructive notice statutes is totally beside the point. The question is not constructive notice as such, but diligence.

5. *Non-residence of plaintiffs will not relieve them from the duty of searching diligently the public records of the state in which the property may exist.*

In *Naddo v. Bardon*, 51 Fed. 493 (C. C. A., 8th Circuit), Mr. Justice Brewer said (p. 496):

"There cannot be one law of laches for the resident and another for the non-resident." (Italics ours.)

In *Williamson v. Beardsley*, 137 Fed. 467 (C. C. A., 8th Circuit), the court again announced the rule (p. 471):

"There is no such quality in distance from the location of public records as would enable us to say that those living within the state are bound to diligence while those living in neighboring states may rest secure without care or inquiry." (Italics ours.)

The case of *Broderick's Will*, 21 Wall. 503, contains an announcement of the same doctrine of this Court (p. 519):

"Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem." (Italics ours.)

This has been cited with approval in numerous other cases.

6. *The bill of complaint will be held bad on motion to dismiss unless facts are pleaded affirmatively showing that diligent search would not have led to knowledge, and unless the bill discloses HOW the facts were ultimately discovered and WHY discovery through the same channel could not have been made earlier.*

In *Wood v. Carpenter*, 101 U. S. 135 at page 140, this Court says:

*"A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * *"* (Italics ours.)

Also at page 143:

"The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

The statement of the rule by this Court in the later case of *Hardt v. Heidweyer*, 152 U. S. 547, at page 558, is even more forceful.

*"It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained, in order that the court may determine whether reasonable effort was made to ascertain the facts. * * *"* (Italics ours.)

Also at page 560:

“Tested by this rule, it is apparent that this bill must be held deficient in not showing *how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge; and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed.*” (Italics ours.)

In *Thornton v. Natchez*, 129 Fed. 84, the Circuit Court of Appeals for the 5th Circuit points out that a mere averment of ignorance is not even the pleading of a fact which is to be deemed to have been admitted upon demurrer, it being taken only as a conclusion of law in the absence of a pleading of facts sufficient to justify the ignorance. The statement of the court on this proposition is (p. 87):

“The bill, it is true, avers that the appellants had neither notice nor knowledge. But such an allegation, in a matter like the one in hand, is *a mere conclusion of the pleader, not binding on demurrer*, unless facts are stated from which the court can determine for itself whether the conclusion was correctly drawn.” (Italics ours.)

Tested by the well established rules laid down above, the bill in this case discloses a plain case for the application of the doctrine of Laches. Delay exceeding ten years makes a prima facie case of Laches. The mere assertion of ignorance, non-residence and lack of means of knowledge upon the part of the McManus heirs falls far short of excusing the delay. It must be remembered that the first assertion of title hostile to the McManus interest took place in 1890, thirty-two years before suit was

brought, and eleven years before McManus died. There is no allegation that George McManus was ignorant of this. The deed was recorded for six years before McManus died, and is not alleged ever to have been questioned or challenged by him. Why his heirs knew nothing of this property when their ancestor died is not alleged. The most likely explanation that comes to mind is that George McManus probably no longer claimed it; that he had received and spent some purchase price that Cy Iba or his grantee had paid for the claim, and forgotten all about it.

On top of this follows over twenty years of complete inactivity upon the part of the McManus heirs. A mere assertion of ignorance is not enough to excuse this.

Then plaintiff came upon the scene. How long he had known of this title flaw, and perhaps even been hunting for some heirs from whom he could purchase it, is not disclosed.

In the meantime, because of the development of oil, central Wyoming has changed from a part of the frontier to an industrial community. Few old prospectors of 1887 are alive. George McManus himself is dead. The witnesses by whom twenty years ago a defendant might have hoped to prove that George McManus was paid for this land, recognized the deed and abandoned all claim of title, are scattered or dead. These considerations show estoppel in favor of defendants to the full limit of any of the cases upon laches relied upon by plaintiff.

But over and above all these things, this Court is not bound to confine its attention to the separate averments of the bills as if each stood alone. Looked at as a whole, the bill plainly reveals all of the badges of a situation which can find no favor in equity. To men of experience it is perfectly evident that the tremendous pyramiding of land value due to the successful development of an oil field is the mainspring to this action.

It is evident that plaintiff, as an attorney in Wyoming, found in some abstract or recorded paper the trail of this old title flaw, that he hunted up the persons through whom it might be asserted, told them of their rights and bought them out at the same time, and has now framed a bill well calculated to develop in him a nuisance value. This is not a frank bill. It dwells on such *minutiae* as book and page of record of location certificates, and the dates of steps taken in the land office, but it does not quote the text of the power of attorney under which Cy Iba conveyed the land; it quotes only selected excerpts from the decision by which the Secretary awarded the lease; it makes no attempt to disclose the effective terms of even such entries in the abstract of title as are touched upon. It does not make a single direct averment as to anything for the benefit of the land that George McManus ever did himself or paid for out of his own pocket.

We do not contend that the Common Law crime of Maintenance is still punishable in Wyoming, and we admit that by Wyoming statute lands in the adverse possession of another may be sold, but we do contend that the principles of common justice, of which the rule against maintenance was one early expression, are still offended when stale title lawsuits are made the subject of speculative sale. A court of equity will not knowingly become the collection agency of such a scheme. Whether this consideration be dealt with under laches or be treated as an instance of unclean hands, the result is the same. It finds clear expression in an opinion rendered by Mr. Justice Brewer, in *Naddo v. Bardon*, 51 Fed. 493 (p. 495):

“No doctrine is so wholesome, when wisely administered, as that of laches. *It prevents the resurrection of stale titles, and forbids the SPYING OUT from the records of ancient and abandoned*

rights. It requires of every owner that he take care of his property, *and of every claimant that he make known his claims.* It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, *because its proper application works out justice and equity,* and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many.” (Italics ours.)

Much the same thought is expressed by Judge Goff in *Reed v. Dinges*, 56 Fed. 171, at page 178:

“The books tell us that *courts of equity will not close their eyes to these matters,* and the cases bearing on the doctrine of laches say that it is the duty of the judge to consider them, and that frequently they will explain the activity existing in connection with demands that have long been dormant. I do not find from any of the decisions that it is the duty of a court of equity *to provide the stimulus that will impart new life to the vapid claims which only present themselves for recognition under the revivifying influences of the eras of development alluded to.*” (Italics ours.)

CONCLUSION.

This suit, to obtain a one-eighth interest in an oil lease in which the government is the lessor, so involves the property interests of the United States that no relief can be given in its absence as a party.

If it be regarded on the merits, then the bill of complaint fails on its face to establish any fiduciary relationship through which the plaintiff can claim any interest in the lease; fails to show any statutory rights in reference thereto conferred upon plaintiff by the so-called "inuring clause" of the Leasing Act; and fails to show any mistake of law in the Interior Department of which plaintiff can take advantage.

The bill does show affirmatively, however, that whatever the legal situation of the parties may once have been, plaintiff is now barred from seeking any relief in equity by reason of long acquiescence and delay.

The bill is totally devoid of equity. It was dismissed by the trial Court, it was dismissed by the Circuit Court of Appeals, and this Court should affirm that decision.

Respectfully submitted,

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ADDENDUM.

Since preparing the foregoing brief two recent decisions of the Circuit Court of Appeals for the Ninth Circuit have come to our attention. They deal with facts closely analogous to the facts presented by this record. In each case it is held that a court of equity has no power to impose a trust in favor of a senior coal entryman upon a coal lease issued to a junior applicant under the Leasing Act of February 25, 1920. We cite these two cases with special reference to the section of our brief dealing with the United States as an indispensable party (pp. 12-16). The cases are:

Wilson v. Elk Coal Co., 7 F. (2nd) 112, decided Aug. 3, 1925.

Proctor v. Painter, 15 F. (2nd) 974, decided Nov. 15, 1926.

In each case the plaintiff, prior to the passage of the Leasing Act, had made what was alleged to be a valid declaratory statement claiming a preference right to make coal entry under R. S. 2348. Then later in each case the Interior Department issued to the defendant a coal lease for the same land under the Leasing Act. The suits were in equity to impose constructive trusts upon the leases. In the *Wilson* case the Court held broadly that whatever the equitable right of plaintiff to have purchased this coal land from the United States, a lease has issued under which the United States is lessor, and,

"the fact remains that the title is still in the United States, and the United States is still claiming that title as against the appellant and all the world. Under such circumstances, we think it is well settled that a suit of this character will not lie."

This Court denied certiorari in the *Wilson* case (269 U. S. 587).

In the *Proctor* case the court noticed certain irregularities in the title pretensions of the defendant as to a part of the coal land (an irregular patent as well as a lease having been issued) and says that in any event the United States is at least still the equitable owner of the coal under the land and hence an indispensable party to any proceeding in which it was sought to control the title to the underlying coal.

Dismissals of the bills were sustained in both cases.

Respectfully submitted,

TYSON S. DINES,
PETER H. HOLME,
HAROLD D. ROBERTS,
J. CHURCHILL OWEN.



APPENDIX.

EXCERPTS FROM STATUTES AND REGULATIONS.

For the convenience of the court, we here set forth, at length, certain sections and parts of sections from the Leasing Act of February 25, 1920, and from the regulations promulgated thereunder, which we deem pertinent to the issues.

* * * *

ACT OF FEBRUARY 25, 1920 (41 STAT. 437).

“Sec. 17. That all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same; not subject to preferential lease, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations to qualified applicants in areas not exceeding six hundred and forty acres and in tracts which shall not exceed in length two and one-half times their width, such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, which shall not be less than 12½ per centum in amount or value of the production, and the payment in advance of a rental of not less than \$1 per acre per annum thereafter during the continuance of the lease, the rental paid for any one year to be credited against the royalties as they accrue for that year. Leases shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods. Whenever the average daily production of any oil well shall not

exceed ten barrels per day, the Secretary of the Interior is authorized to reduce the royalty on future production when in his judgment the wells cannot be successfully operated upon the royalty fixed in the lease. The provisions of this paragraph shall apply to all oil and gas leases made under this Act.

“Sec. 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the preexisting placer-mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than $12\frac{1}{2}$ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided*, That not more than one-half of the area, but in no case to exceed three thousand two hundred acres, within the geologic oil or gas structure of a producing oil or gas field shall be leased to any one claimant under the provision of this section when the area of such geologic oil structure exceeds six hundred and forty acres. Any claimant or his successor, subject to this limitation, shall, however, have the right to select and

receive the lease as in this section provided for that portion of his claim or claims equal to, but not in excess of, said one-half of the area of such geologic oil structure, but not more than three thousand two hundred acres.

All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the execution of such lease shall be fixed by the Secretary of the Interior under appropriate rules and regulations: *Provided, however,* That as to all like claims situate within any naval petroleum reserve the producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof, upon the terms and payment of royalties for past and future production as herein provided for in the leasing of claims. No wells shall be drilled in the land subject to this provision within six hundred and sixty feet of any such leased well without the consent of the lessee: *Provided, however,* That the President may, in his discretion, lease the remainder or any part of any such claim upon which such wells have been drilled, and in the event of such leasing said claimant or his successor shall have a preference right to such lease: *And provided further,* That he may permit the drilling of additional wells by the claimant or his successor within the limited area of six hundred and sixty feet theretofore provided for upon such terms and conditions as he may prescribe.

No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Govern-

ment affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest', approved March 2, 1911", approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interest may appear, subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: *Provided*, That no claimant acquiring any interest in such lands since September 1, 1919, from a claimant on or since said date claiming or holding more than the maximum allowed claimant under this section shall secure a lease thereon or any interest therein, but the inhibition of this proviso shall not apply to an exchange of any interest in such lands made prior to the 1st day of January, 1920, which did not increase or reduce the area or acreage held or claimed in excess of said maximum by either party to the exchange: *Provided further*, That no lease or leases under this section shall be granted, nor shall any interest therein, inure to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for.

* * * *

"Sec. 30. That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior.* * * (Remainder

of section deals only with surrender of lease and conditions of work.)

* * * *

“Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purpose of this Act: *Provided*, that nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

* * * *

“Sec. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled ‘Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming’, approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.”

REGULATIONS ON OIL AND GAS.

Of March 11, 1920, with Subsequent Amendments.
(G. L. O. Circular No. 672.)

“No. 24½. **WHO MAY APPLY.**—All proper parties to a claim for relief under section 18, 19, or 22 of the act should join in the application, but, if for any sufficient reason that is impracticable, any person claiming a fractional or undivided interest in such claim may make application for a lease or permit, stating the nature and extent of his interest, and the reasons for nonjoinder of his co-owner or co-owners. In cases where two or more applications are made for the same claim or part of a claim, leases or permits will be granted to one or more of the claimants, as the law and facts shall warrant and as shall be deemed just.”

“25. **FORM AND CONTENTS OF APPLICATION.** * * *

“(d) **ORIGIN AND BASIS OF APPLICANT'S CLAIM FOR RELIEF.** The applicant must bring his claim clearly within all the requirements of the act as specifically pointed out in sections 18, 20, and 22 of these regulations. Every application must be supported by a duly certified abstract of title to the land brought up to the date of filing the application. In the event an abstract of title is already on file in the Land Department, a supplemental abstract extending over the period or periods not covered by the former may be furnished, and if furnished will be considered in connection with the abstract already on file. If any fraud has been committed in connection therewith, then a full affirmative showing must be made by the applicant to the effect that he has not been a party to such fraud, and that he has not been guilty of any fraud or had knowledge of fraud or reasonable grounds to know of any fraud in connection with his claim. If an application for patent has been filed, a brief resume of the actions taken thereon should be stated. If the

land is or has been involved in litigation in the courts to which the United States is a party, the status or result of such litigation should be furnished.

“No. 27. PUBLICATION OF NOTICE.—Immediately upon the filing of an application for a lease or permit under section 18, 19, or 22 of the act, the register and receiver will cause to be published, at the expense of the applicant, in a newspaper designated by the register, published in the vicinity of the land and most likely to give notice to the general public, a notice of the said application in substantially the following form:

DEPARTMENT OF THE INTERIOR
UNITED STATES LAND OFFICE.

_____,
_____, 19____
Notice is hereby given that _____, of _____, has applied for an oil and gas _____ under section _____ of the act of February 25, 1920 (Public No. 146), for _____ section _____, township _____ of range _____, _____ meridian, _____ county, State of _____. Any and all persons having adverse or conflicting claims to said land are hereby notified that a full statement, under oath, of such claim should be filed in this office showing a superior right to a permit or lease under said act or a valid existing adverse or conflicting claim to the land or the minerals therein under the public-land laws, on or before _____; otherwise such claim may be disregarded in granting the permit or lease applied for.

Register.

The register and receiver will fix a date in the notice on or before which adverse or conflicting claims may be asserted, which date should be not less than 30 nor more

than 40 days after the date of first publication of the notice.

Such notice will be published in the regular issue and not in any supplement of the newspaper, once each week for a period of five consecutive weeks if in a weekly paper, or if in a daily paper for a period of 30 days. The register and receiver will post a copy of said notice in a conspicuous place in their office during the period of publication.

Upon the applicant's furnishing satisfactory proof of such publication, but not earlier than the day following that set in the published notice on or before which adverse or conflicting claims were to be filed, the register and receiver will transmit by special letter all papers in the case, including any adverse or conflicting claims that may have been filed, together with proof of posting said notice in their office, to the Commissioner of the General Land Office."

"No. 28. ADVERSE OR CONFLICTING CLAIMS—PROCEDURE.—In case of adverse or conflicting claims for leases under section 18, 19, or 22, or permits under section 19 or 22, the Secretary of the Interior is clothed with authority to grant leases or permits, as the case may be, to one or more of them, as shall be deemed just.

(a) To have their claims considered in connection with the awarding of leases or permits it will be necessary for adverse claimants to make full showing (1) of a superior right to lease or permit under this act, or (2) a superior right under some other public-land laws. If the former, the conflicting claimant must make out a complete case in his own behalf as required by these regulations on or before August 25, 1920.

(b) Upon receipt of the application and showing of an adverse claimant the Commissioner of the General

Land Office will consider same. If, in his judgment, the adverse claimant has failed to make a *prima facie* case showing that he is entitled to a lease or permit, as the case may be, for at least part of the land, his application will be rejected, subject to appeal to the Secretary of the Interior. But if the adverse claimant makes out a *prima facie* case the commissioner will take such course as may be advisable under the circumstances of each particular case to settle and adjust the rights of the respective parties, and may, if deemed necessary, order a formal hearing to settle disputed questions of fact. In the absence of appeal to the Secretary of the Interior from the final order or decision of the Commissioner same shall be conclusive."

WITHDRAWAL OF SEPTEMBER 27, 1909.

September 27, 1909.

The Honorable,

The Secretary of the Interior.

Sir:

In accordance with your orders I have the honor to submit the following recommendation which covers approximately 3,041,000 acres of which the larger part is probably private land and not affected by this withdrawal.

Temporary Petroleum Withdrawal No. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

(Here follows several pages of land descriptions.)

* * * * *

Very Respectfully,

H. C. Rizer,
Acting Director.

Approved September 27, 1909,
and sent to General Land Office.

Frank Pierce,
Acting Secretary.

WITHDRAWAL OF JULY 2, 1910 (WYOMING).

July 1, 1910.

The Honorable,
The Secretary of the Interior.

Sir:

In accordance with your instructions I recommend the withdrawal for classification and in aid of legislation affecting the use and disposition of the petroleum deposits belonging to the United States of the following areas in the State of Wyoming, involving approximately 255,461 acres:

Order of Withdrawal.
Petroleum Reserve No. 8.

It is hereby ordered that those certain orders of withdrawal made heretofore:

On Sept. 27, 1909, and described as Temporary Petroleum Withdrawal No. 5;

On Oct. 12, 1909, and described as Temporary Petroleum Withdrawal No. 6;

On Oct. 12, 1909, and described as Temporary Petroleum Withdrawal No. 7;

On Oct. 30, 1909, and described as Temporary Petroleum Withdrawal No. 8;

On Feb. 12, 1910, and described as Temporary Petroleum Withdrawal No. 13;

On April 8, 1910, and described as Temporary Petroleum Withdrawal No. 14.

On June 18, 1910, and described as Temporary Petroleum Withdrawal No. 17;

in so far as the same include any of the lands hereinafter described, be, and the same are hereby ratified, confirmed, and continued in full force and effect; and subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases", approved June 25, 1910, there is hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, all of those certain lands of the United States set forth and particularly described as follows, towit:

* * * *

(Here follows several pages of land descriptions.)

Very respectfully,

Geo. Otis Smith,
Director.

July 1, 1910.

Respectfully referred to the President with recommendation that same be approved.

R. A. Ballinger
Secretary.

Approved July 2, 1910, and referred to the Secretary of the Interior.

Wm. H. Taft
President.

Referred to the Commissioner of the
General Land Office for appropriate
action.

Frank Pierce
Acting Secretary.

WYOMING STATUTE OF LIMITATION.

Wyoming Compiled Statutes, 1920, Section 5564.

“Limited to ten years. An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of such action accrues.”

Office Supreme Court, U
FILED

FEB 21 1927

WM. R. STANBURY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1926.

—
No. 166.
—

JAMES M. HODGSON, *Appellant*,

vs.

FEDERAL OIL AND DEVELOPMENT COMPANY AND THE
MOUNTAIN AND GULF OIL COMPANY, *Appellees*.

—
APPELLEES' SHOWING IN OPPOSITION TO
APPELLANT'S MOTION FOR LEAVE TO
AMEND COMPLAINT.
—

TYSON S. DINES,
PETER H. HOLME,
HAROLD D. ROBERTS,
J. CHURCHILL OWEN,
CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
Solicitors for Appellees.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1926.

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JAMES M. HODGSON, *Appellant*,

vs.

FEDERAL OIL AND DEVELOPMENT COMPANY AND THE
MOUNTAIN AND GULF OIL COMPANY, *Appellees*.

SHOWING ON BEHALF OF APPELLEES IN OP-
POSITION TO MOTION TO AMEND COM-
PLAINT.

Come now the appellees above named by their soli-
citors undersigned and make the following showing
of facts to this honorable court in opposition to the
"MOTION TO AMEND BILL OF COMPLAINT"
filed by the appellant in this court.

1. It appears from the face of said motion to amend
when compared with the bill of complaint set forth
in the transcript of record in this case that all of the
allegations of new matter sought to be presented by

said amendment may be summarized under three headings, to wit:

(A) Certain additional alleged facts dealing with the residence of George McManus at the time of his death, the condition, residence and lack of information of his heirs at that time, and the circumstances surrounding his heirs from the date of the death of McManus down to February, 1922.

(B) A short statement found in lines 15 to 20 on page 2 of the motion to the effect that George McManus contributed his proportionate share of annual labor during certain years.

(C) An averment appearing near the bottom of page 4 of the motion and continued on to the top of page 5, dealing with the knowledge which the plaintiff had and the circumstances under which he came to bring this suit.

2. All of the averments of new matter summarized under (A) above were pleaded in connection with this same George McManus by this same plaintiff in a petition filed January 11, 1923, in a case entitled J. M. Hodgson, Plaintiff, vs. The Mountain and Gulf Oil Company, a Corporation, Defendant, commenced in the District Court of the Sixth Judicial District of the State of Wyoming for Natrona County, No. 3531 on the docket of that court. These averments appear in paragraph numbered 12 of said petition and are there pleaded in almost the identical language in which they are offered as an amendment to the bill in the instant case.

3. The entire averment of new matter summarized under (B) above was used as an assertion by the plaintiff near the bottom of page 2 of his brief filed in the circuit court of appeals for the Eight circuit in the

case at bar when it was pending there. That brief was filed July 19, 1924. The appellees called the attention of the circuit court of appeals to the fact that this assertion was not supported by an allegation in the bill. No effort to amend was made by plaintiff in the circuit court of appeals and the assertion is again repeated on page 47 of plaintiff's brief in this court. The truth of this proposed averment is still not vouched for by oath of the plaintiff or of any one on his behalf.

4. All of the averments of new matter summarized under (C) above relate to the knowledge of frame of mind of the plaintiff who prepared the original bill, and must, therefore, have been known to him as fully when the bill was first filed as at the present time.

5. The absence of any averments covering the matters now sought to be covered by the proposed amendment has been commented upon both in written and oral arguments of this case in the trial court and in the circuit court of appeals, and has been covered by briefs now on file in this court. No effort to amend along these lines has been made by plaintiff at any earlier stage of these proceedings.

Based upon the facts hereinabove stated, the appellees submit that the appellant has lost by his own delay and negligence any right to amend in the manner proposed. Upon this ground, and upon the further ground that the amendment tendered is totally immaterial and could not cure the defects in the bill of complaint, appellees pray that the motion to amend the bill of complaint be not allowed.

Dated at Denver, Colorado, this 19th day of February, 1927.

TYSON S. DINES,
PETER H. HOLME,
HAROLD D. ROBERTS,
J. CHURCHILL OWEN,
CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
Solicitors for Appellees.

District of Columbia, ss:

Charles C. Heltman being first duly sworn according to law, deposes and says that he has read the above showing and that the facts therein stated are true, to the best of the affiant's knowledge, information and belief; that affiant is informed that the above showing will be further verified upon personal knowledge, by Harold D. Roberts, of Denver, Colorado, Solicitor for Appellees; that affiant is informed by telephone from said Roberts that service of motion to amend bill of complaint in this cause was made upon counsel of appellees on February 19, 1927, in the city of Denver, Colorado.

Subscribed and sworn before me this 21st day of February, A.D. 1927.

Notary Public.